Appointment

From: Leopold, Matt (OGC) [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=4E5CDF09A3924DADA6D322C6794CC4FA-LEOPOLD, MA]
Sent: 8/15/2018 11:06:28 AM
To: Leopold, Matt (OGC) [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=4e5cdf09a3924dada6d322c6794cc4fa-Leopold, Ma]; Tenpas, Ronald J. [ronald.tenpas@morganlewis.com]; Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]; Fotouhi, David [Fotouhi.David@epa.gov]

Subject: Meeting with Morgan, Lewis & Bockius LLP
Location: EPA Headquarters, 1200 Pennsylvania Ave. NW, 4th Floor, Room 4045

Start: 8/17/2018 5:00:00 PM
End: 8/17/2018 5:45:00 PM
Show Time As: Busy

Upon clearing security, an escort will come down to bring you to Matt's office. Please enter via the north side entrance. Thanks.

Message

From: Elliott, Don [DElliott@cov.com]
Sent: 1/16/2018 11:35:48 AM
To: Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]
Subject: Re: Time for a brief call this weekend?

Good morning Justin. If it is convenient for you, you could call me at Ex. 6 from now until 9 a.m., when I leave to teach a course at Yale. From 12:15 to 4:45, I anticipate being in my office at Yale at Ex. 6 but it would be good to fix an approximate time if you can as I will probably go to lunch at some point.

Don Elliott

> On Jan 15, 2018, at 14:40, Schwab, Justin <Schwab.Justin@epa.gov> wrote:
>
> Congratulations! Let's aim either for tonight or early tomorrow.
>
> Sent from my iPhone
>
>> On Jan 15, 2018, at 12:23 PM, Elliott, Don <DElliott@cov.com> wrote:
>>
>> Thanks Justin. I appreciate your getting back to me on a holiday. Ex. 6
Ex. 6
>>
>> You could reach me on my cell phone between 4:30 and 6 pm at Ex. 6 or after 8 pm back home in CT at Ex. 6 Tomorrow morning early is also possible.
>>
>> I look forward to speaking.
>>
>> Don Elliott
>>
>> On Jan 15, 2018, at 11:24, Schwab, Justin <Schwab.Justin@epa.gov<mailto:Schwab.Justin@epa.gov>> wrote:
>>
>> Don - I can call you this afternoon/evening. What times would work best for you?
>>
>> Sent from my iPhone
>>
>> On Jan 13, 2018, at 9:06 AM, Elliott, Don <DElliott@cov.com<mailto:DElliott@cov.com>> wrote:
>>
>> Justin,
>>
>> I apologize for bothering you on a long weekend, but is there a good time for me to give you a brief call this weekend? If so, what time is good and what is a good number? Or you could call me at Ex. 6 Ex. 6 if that's more convenient for you. The subject is largely personal and will only take about 5 minutes. (It does NOT involve the Clean Air Act matter I spoke to you about some time ago.)
>>
>> Best, and happy new year,
>>
>> Don
>>
>>

Message

From: matthew.kuryla@bakerbotts.com [matthew.kuryla@bakerbotts.com]
Sent: 12/21/2017 12:54:02 PM
To: Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]
Subject: Title V

I do have a specific question for you, if you have a minute. Curious for your thoughts on what is to be accomplished by changes to permits. Happy to discuss by phone if more convenient. Cell is Ex. 6

Sent from my iPhone

Message

From: matthew.kuryla@bakerbotts.com [matthew.kuryla@bakerbotts.com]
Sent: 5/4/2018 5:59:34 PM
To: Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]; jim.rizk@tceq.texas.gov
Subject: Texas petition on SSM SIP call

Justin, following up. I would like to invite another call with you and TCEQ to discuss next steps on the petition. Let me know if we should include someone from OAR as well.

Monday afternoon 5/7 would work well. As would next Wednesday or Thursday afternoon.

Message

From: Schon, Mike [mschon@USChamber.com]
Sent: 4/13/2018 6:19:37 PM
To: Wehrum, Bill [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=33d96ae800cf43a3911d94a7130b6c41-Wehrum, Wil]; Leopold, Matt [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=4e5cdf09a3924dada6d322c6794cc4fa-Leopold, Ma]
CC: Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]
Subject: New York State CAA Section 126 Petition
Attachments: 2018.04.13 Letter to USEPA re Section 126.pdf

Dear Messrs. Wehrum and Leopold:

Attached please find a letter from Karen Harbert, President and CEO of the Global Energy Institute of the U.S. Chamber of Commerce, regarding New York State's March 2018 Petition for a Finding Pursuant to Clean Air Act Section 126. The letter asks EPA to exercise its authority to extend the review period for the petition to, among other things, allow the public an adequate opportunity to review and comment on the technical and legal issues raised by the petition.

We appreciate your consideration of the request explained in the letter. In the meantime, please let me know if I can answer any questions or provide further information.

Regards,

Michael B. Schon
Deputy Chief Counsel
U.S. Chamber Litigation Center
1615 H Street NW
Washington, DC 20062
Ex. 6
mschon@uschamber.com

U.S. CHAMBER OF COMMERCE

1615 H Street, NW
Washington, DC 20062-2000
www.uschamber.com

April 13, 2018

By Electronic Mail and First-Class Mail

Mr. William Wehrum
Assistant Administrator, Office of Air and Radiation
USEPA Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, DC 20460

Mr. Matthew Leopold
General Counsel
USEPA Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 2310A
Washington, DC 20460

Dear Messrs. Wehrum and Leopold:

I write on behalf of the U.S. Chamber of Commerce (the "Chamber") to request that the U.S. Environmental Protection Agency ("EPA" or "Agency") extend the review period for the State of New York's Clean Air Act Section 126 petition in order to afford the public the right to participate fairly and fully in the process leading up to the agency's decision. *See* New York State Petition for a Finding Pursuant to Clean Air Act Section 126 (Mar. 12, 2018) (the "Petition").

The Chamber is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system. To this end, the Chamber regularly comments and engages the Agency on regulatory matters of interest to the business community.

New York's Petition seeks to invoke Section 126 of the Clean Air Act ("CAA" or "Act") to compel EPA to either order the shutdown of over 350 specific facilities or impose additional, unnecessary, burdensome and costly limits on nitrogen oxide ("NOx") emissions from these

facilities in a nine-state area. Several of these targeted sources are Chamber members who are just learning of the Petition.

While the Petition is both legally and technically deficient, New York's proposed schedule for EPA's resolution of the Petition would violate our members' right to participate meaningfully in the process. Citing Section 126(b) of the CAA, New York requests that EPA grant its Petition within sixty days. However, that timeline ignores the magnitude of New York's request and the technical and legal issues on which the public should be afforded a meaningful opportunity to review and comment. Section 307(d) of the Act allows EPA to extend the deadline for responding to the Petition by six months upon a finding that an extension is "necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection." *See* 42 U.S.C. §§ 7607(d)(1)(N), (d)(10). Section 307(d) provides procedural protections beyond those offered by the Administrative Procedure Act to allow meaningful public engagement in light of the societal significance of issues under the Act. *See Union Oil Co. of California v. EPA*, 821 F.2d 678, 682 (D.C. Cir. 1987).

An extension of at least six months is necessary for several reasons.

New York's Section 126 Petition is Unprecedented in Scope. The Petition targets every stationary source in a nine-state area that it alleges emits 400 tons per year or more of NOx, resulting in New York naming over 350 sources in its Petition. The appendices to the Petition also lists dozens of other sources below the 400 ton per threshold, but without any explanation of why New York chose to include them. The breadth of the Petition suggests that it might impact other currently unnamed sources. The relevant named facilities span a range of industry sectors, including cement, chemicals, electric generation, midstream oil and gas, paper, refining and steel. Prior petitions have focused on electric generating units, with most petitions targeting only a single power plant in a single state. The analysis for a multi-sector rulemaking spanning several states is far more complex than a single-site assessment. Indeed, the last Section 126 rulemaking that the agency conducted in parallel with the NOx SIP Call took several years to prepare and finalize.

The Petition Breaks from Prior EPA Models, Emissions Inventories and Methodologies. EPA recently performed complex air quality modeling in support of the Cross State Air Pollution Rule Update (CSAPR Update), using the CAMx 2017 Source Apportionment Model. That modeling included the nine-state area and the sources named in New York's Petition. Rather than using that EPA modeling, however, New York conducted its own assessment using a different model, "CMAQ." The CMAQ modeling runs did not use the same emissions inputs as EPA's CAMx modeling. Instead, New York relied on a regional organization's emissions inventory, the MARAMA 2017 Beta Emissions Inventory. In analyzing its modeling, the Petition used a different approach than used by EPA for calculating ozone contributions, and it used a novel metric to assess whether NOx emissions contribute to ozone in New York monitors. Our initial technical review of New York's Petition suggests that it suffers from several technical defects, such as overinflating emissions from numerous facilities and inclusion of monitors that show attainment with the ozone standard due to CSAPR and other regulations. However, New York's new modeling runs, data and methodologies are not publicly available in a form that

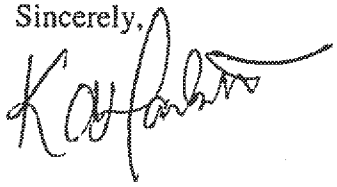
would allow the Chamber and its members to review and assess its validity in a robust and methodological fashion, so our initial technical review is limited. The analysis of New York's modeling and data – once secured – can take months. Additionally, the Data Quality Act and EPA's Information Quality Guidelines require information EPA relies upon to support its decisions to be accurate and reliable. EPA Office of Envtl. Info., "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity, of Information Disseminated by the Environmental Protection Agency" (EPA/260-R-02-008), § 5.3 (Oct. 2002). EPA cannot meet this requirement until it has obtained and can review New York's modeling and data. Reviewing the analysis underlying the Petition requires additional time in the petition process.

New York's Novel Theory of RACT. In its Petition, New York requests that EPA impose Reasonably Available Control Technology ("RACT") on the named sources based on New York's opinion of what constitutes RACT. Specifically, New York defines RACT as NOx limits that cost as much as $5,000 per ton, based on how New York implements and enforces RACT within its borders. Significant constitutional and statutory issues are raised by New York's attempt to apply its definition of RACT extra-territorially. New York's opinion of RACT is more than three times higher than the $1,400 per ton cost threshold used in the CSAPR Update to identify cost-effective NOx controls for electric generating units, which tend to be much larger emitters than other industrial sources. Likewise, the Petition departs from past EPA precedent because it rejects using ozone budgets and NOx trading, policy options that EPA has used in prior transport rulemakings to drive down costs. New York, instead, insists on continuous emission limits using a 24-hour averaging time. The legal and technical analysis of New York's novel RACT theory will necessarily require more time, particularly when analyzing multiple industry sectors spread across nine states.

EPA's Existing Section 126 Docket Commands a Significant Share of Agency Resources. At least six other Section 126 petitions are pending. Each depends on complex photochemical modeling, which is a time-intensive analytical tool. In light of the existing docket, an extension is necessary.

Based on the above, we are requesting that EPA exercise its authority to extend the review period by six months. We appreciate your consideration of this request. Please contact my colleague Michael Schon, Deputy Chief Counsel, U.S. Chamber Litigation Center, at 202-463-5948 if you have any questions.

Sincerely,



Karen A. Harbert
President and CEO
Global Energy Institute
U.S. Chamber of Commerce

CC: Mr. Justin Schwab, Deputy General Counsel, USEPA

Message

From: matthew.kuryla@bakerbotts.com [matthew.kuryla@bakerbotts.com]
Sent: 4/27/2018 2:32:28 PM
To: Leopold, Matt [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=4e5cdf09a3924dada6d322c6794cc4fa-Leopold, Ma]
CC: Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]; Shaffer, Patricia [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=47ce854437af49dab8ab700a46837fd5-PShaffer]
Subject: Re: Phone Call w/Baker Botts LLP re: South Coast

Ready when you are at Ex. 6

Sent from my iPhone

> On Apr 27, 2018, at 7:49 AM, Leopold, Matt <Leopold.Matt@epa.gov> wrote:
>
>
> <meeting.ics>

Message

From: matthew.kuryla@bakerbotts.com [matthew.kuryla@bakerbotts.com]
Sent: 4/27/2018 11:46:39 AM
To: Leopold, Matt [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=4e5cdf09a3924dada6d322c6794cc4fa-Leopold, Ma]
CC: Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]; Shaffer, Patricia [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=47ce854437af49dab8ab700a46837fd5-PShaffer]
Subject: Re: Phone Call w/Baker Botts LLP re: South Coast

Please use this phone number: **Ex. 6** I am working remotely. The new time works. Thanks.

Sent from my iPhone

> On Apr 27, 2018, at 7:42 AM, Leopold, Matt <Leopold.Matt@epa.gov> wrote:
>
>
> <meeting.ics>

Message

From: Elliott, Don [DElliott@cov.com]
Sent: 1/19/2018 9:05:15 PM
To: Breen, Barry [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=1b44bce1a71e4a95acaf82f2fbc858b0-BBREEN]
Subject: Re: Hello and Request for a Brief Call

Barry,

Thanks for asking Susan Bodine to call me. We had a good conversation.

Don.

Don Elliott

On Jan 17, 2018, at 19:56, Elliott, Don <DElliott@cov.com<mailto:DElliott@cov.com>> wrote:

Hi Barry and Happy New Year,

Is there a good time when I could reach you for a brief call tomorrow Thursday Jan 18 or Friday Jan 19? I recently was retained by Republic Services, one of the PRPs at the Westlake landfill (a site that you may have heard of).

I have been looking at litigation options to challenge the Agency's powers to issue UAOs, and have discussed some of what we are considering with Deputy General Counsel Justin Schwab in OGC. Both he and I thought it would be worthwhile for you and I to talk briefly about the risks on both sides before the Agency issues its proposed decision.

I'd also be pleased to come in for an in person meeting if you'd prefer, but a short (15 minute) call should be sufficient.

With best regards,

Don Elliott

E. Donald Elliott
Covington & Burling LLP
One CityCenter, 850 Tenth Street, NW, Washington, DC 20001
T Ex. 6 M Ex. 6 DElliott@cov.com<mailto:DElliott@cov.com>

Message

From: Lindley, Emily [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C8706181EC9643278DFCB48B83E4AD5D-LINDLEY, EM]
Sent: 6/12/2018 7:57:24 PM
To: matthew.kuryla@bakerbotts.com [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=0f258c275a5c45119dd6a95a93f7b41e-matthew.kuryla@bakerbotts.com]
CC: Koerber, Mike [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9c513901d4fd49f9ab101a6f7a7a863e-Koerber, Mike]; Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]; jim.rizk@tceq.texas.gov
Subject: Re: Texas petition for reconsideration of SSM SIP call

Hi all. Sorry I never responded to this. If the call is still happening I'd like to listen in. I don't believe it's been scheduled?

Thanks,

Emily Lindley

Chief of Staff, Region 6

214-665-2112 (w)

Sent from my iPhone

On May 22, 2018, at 11:48 AM, "matthew.kuryla@bakerbotts.com" <matthew.kuryla@bakerbotts.com> wrote:

> Mike and Justin, following up. Would you be available for a call to discuss the Texas petition?
>
> Emily and Jim would join. Based on their availability, what works best for you among these times:
>
> Tuesday 5/29: 10, 11 or 5
> Wednesday 5/30: anytime noon or later
>
> All times eastern. Just let us know. Thanks!

Message

From: matthew.kuryla@bakerbotts.com [matthew.kuryla@bakerbotts.com]
Sent: 4/17/2018 1:48:11 PM
To: Leopold, Matt [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=4e5cdf09a3924dada6d322c6794cc4fa-Leopold, Ma]; Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]
Subject: Redesignation substitute analysis
Attachments: HGB 1997 O3 RS and Regulatory Overview.docx.pdf

Matt and Justin, forwarding an analysis that may be relevant to current issues.

For today, we'd just like to confirm with you that nothing is underway that would contradict it.

TEXAS INDUSTRY PROJECT **March 6, 2018**

Regulatory Process in the wake of *South Coast*

On February 16, 2018, the U.S. Court of Appeals for the D.C. Circuit issued an opinion in *South Coast Air Quality Management District v. EPA*, vacating portions of EPA's 2008 ozone implementation rule. In the opinion, the court held that EPA's nationwide Part 51 requirements for state "redesignation substitute" submittals failed to include three of five SIP plan components required by Clean Air Act Section 107(d)(3)(E).

Notably, the opinion did not invalidate the HGB and DFW redesignation substitutes separately promulgated by EPA into Part 81 in 2015 and 2016.

The opinion, if it survives rehearing and appeal, would at most call for a process to prepare and submit the three additional plan elements for EPA review and approval. In the interim, EPA's rulemaking actions on HGB and DFW, which were not judicially challenged, remain in force in Part 81 pending a further EPA rulemaking such as a SIP call or error correction action. Before revisiting the Part 81 actions, the appropriate process would be for Texas to have an opportunity to submit the additional plan elements.

Below are four key reasons why the *South Coast* opinion, if it stands, does not invalidate the separate Part 81 actions and cause HGB and DFW to revert immediately to "severe" and "serious" status:

1. **Rule of law.** EPA's Part 81 actions in 2015 and 2016 were separate final agency actions, each with administrative records that were not before the court in *South Coast*. The Part 81 actions underwent notice-and-comment and were judicially reviewable. No petitions for review were filed on them. They cannot be undone by a judicial opinion reviewing a different final agency action on a different record.

2. **Sustained clean air.** The HGB and DFW areas not only attained both the 125 ppb 1-hour standard and the 84 ppb 8-hour standard, but also have maintained good air quality against those standards.

3. **Cooperative federalism.** Texas framed its Part 81 submittals in the form that EPA specified by rule for Texas and other states. Those submittals could have included the additional plan components, had the rules so provided. The cooperative federalism framework of the Clean Air Act provides an opportunity for Texas to supplement its submittals before EPA's Part 81 actions are revisited.

4. **Infrastructure impact.** Substantial investments in manufacturing infrastructure are underway based on EPA's Part 81 actions. "Springing" into a higher nonattainment status would cause a major detrimental impact to the Texas economy.

TEXAS—1997 8-HOUR OZONE NAAQS

[Primary and secondary]

Designated area	Designation [a]		Category/classification	
	Date [1]	Type	Date [1]	Type
* * * * * * *				
Dallas-Fort Worth, TX:				
Collin County [5 6]		Nonattainment	(5)	Subpart 2/Serious.
Dallas County [5 6]		Nonattainment	(5)	Subpart 2/Serious.
Denton County [5 6]		Nonattainment	(5)	Subpart 2/Serious.
Ellis County [5 6]		Nonattainment	(5)	Subpart 2/Serious.
Johnson County [5 6]		Nonattainment	(5)	Subpart 2/Serious.
Kaufman County [5 6]		Nonattainment	(5)	Subpart 2/Serious.
Parker County [5 6]		Nonattainment	(5)	Subpart 2/Serious.
Rockwall County [5 6]		Nonattainment	(5)	Subpart 2/Serious.
Tarrant County [5 6]		Nonattainment	(5)	Subpart 2/Serious.
* * * * * * *				

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is June 15, 2004, unless otherwise noted.
* * * * * * *
[5] Effective January 19, 2011.
[6] A Redesignation Substitute was approved on November 8, 2016.

* * * * *

[FR Doc. 2016–26585 Filed 11–7–16; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R06–OAR–2015–0609; FRL–9953–89–Region 6]

Clean Air Act Redesignation Substitute for the Houston-Galveston-Brazoria 1997 8-Hour Ozone Nonattainment Area; Texas

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a redesignation substitute and making a finding of attainment for the revoked 1997 8-hour ozone National Ambient Air Quality Standard (NAAQS) for the Houston-Galveston-Brazoria ozone nonattainment area (HGB area).

DATES: This rule is effective on December 8, 2016.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R06–OAR–2015–0609. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the EPA Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733.

FOR FURTHER INFORMATION CONTACT: Tracie Donaldson, 214–665–6633, *Donaldson.tracie@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document "we," "us," and "our" means the EPA.

I. Background

The background for this action is discussed in detail in our May 25, 2016 proposal (81 FR 33166). In that document we proposed to approve a redesignation substitute and make a finding of attainment for the 1997 8-hour ozone NAAQS for the Houston-Galveston-Brazoria ozone nonattainment area (HGB area). The redesignation substitute demonstration indicates that the area has attained the revoked 1997 8-hour ozone NAAQS due to permanent and enforceable emission reductions and that it will maintain that NAAQS for ten years from the date of the EPA's approval of this demonstration. Final approval of the redesignation substitute results in the area no longer being subject to any remaining applicable anti-backsliding requirements, including nonattainment new source review, associated with the revoked NAAQS. In general, final approval of the redesignation substitute allows Texas to seek to revise the Texas SIP for the area to remove anti-backsliding measures from the active portion of its SIP if it can demonstrate, pursuant to CAA section 110(1), that such revision would not interfere with attainment or maintenance of any applicable NAAQS, or any other requirement of the CAA. Because the EPA believes Texas does not need to revise its SIP to alter certain provisions for NNSR effective in the HGB area, the offset and threshold requirements applicable in the HGB area for NNSR will be automatically altered upon finalization of the redesignation substitute.

We previously approved a HGB area redesignation substitute for the revoked 1-hour ozone standard (80 FR 63429). In this action, we are also finalizing a non-substantive technical correction to 40 CFR 81.344 to reflect this approval.

We received comments on the proposal from five commenters. Our response to the comments are below.

II. Response to Comments

Comment: Three commenters recognized the progress of the area and the work of TCEQ in making such significant air quality improvements in the HGB area and urged the EPA to finalize this action to reflect the changes in the area.

Response: We agree with the commenters that HGB area has made progress in meeting air quality standards. No changes were made to the final action based on these comments.

Comment: One of the supportive commenters urged the EPA to approve revisions to the Texas SIP to reflect changes to certain provisions for the NNSR program effective in the HGB area as a result of the EPA's approval of the

redesignation substitute. The commenter also asserted that approval of the redesignation substitute will result in the area no longer being subject to any remaining applicable anti-backsliding requirements.

Response: Due to the drafting of the Texas SIP, no revision is necessary to alter NNSR requirements applicable in the HGB area following finalization of this redesignation substitute. The NNSR provisions in the existing Texas SIP contains a provision that cross-references the designation of the area to 40 CFR part 81. See 30 TAC section 101.1(71). Because of the structure of this provision, the identification of an area's classification, and thus the related major source thresholds and offset ratios, is updated without any additional revision to the SIP. Therefore, the EPA's approval of the redesignation substitute automatically updates the applicable NNSR requirements. Following finalization of this rule, the NNSR requirements applicable in the HGB area will be in accordance with the HGB area's current classification for the 2008 ozone NAAQS for newly permitted sources.[1] We note that approval of this redesignation substitute does not relieve sources in the area of their obligations under previously established permit conditions.[2] 81 FR 33161, 33165. The Texas SIP includes a suite of approved permitting regulations for the Minor and Major NSR, which will continue to apply after approval of the redesignation substitute in the HGB area. Each of these programs has been evaluated and approved by EPA as consistent with the requirements of the CAA and protective of air quality, including the requirements at 40 CFR 51.160 whereby the TCEQ cannot issue a permit or authorize an activity that will result in a violation of applicable portions of the control strategy or that will interfere with attainment or maintenance of a national standard. So moving forward to a time when the HGB area has a marginal designation as the only applicable nonattainment designation, new sources and modifications will continue to be permitted and authorized under the existing SIP requirements if they are determined to be protective of air quality. We would also note that EPA has proposed to reclassify Houston from marginal to moderate for the 2008 ozone NAAQS. 81 FR 66240, September 27, 2016.

The EPA agrees that approval of the redesignation substitute will result in the HGB area no longer being subject to the regulatory anti-backsliding requirements for the 1997 ozone standard established pursuant to the principles of CAA section 172(e). However, if an anti-backsliding provision is in the Texas SIP and needs to be changed to reflect the change in this area's status, such change is subject to the SIP revision process, which in turn is subject to review under CAA sections 110 and 193, if applicable. To date, Texas has not submitted a SIP revision concerning any anti-backsliding provisions for the EPA's consideration.

Comment: One commenter also recognized the progress and supported the action but wanted the EPA to clarify that the redesignation substitute will permanently eliminate the anti-backsliding requirements for the revoked ozone NAAQS.

Response: Following finalization of a redesignation substitute, an area is no longer subject to any remaining applicable anti-backsliding requirements associated with the specific revoked NAAQS, including the major source thresholds and offset ratios associated with the area's classification under those standards. However, as noted previously, any changes to a SIP are subject to consistency checks with CAA sections 110(l) and 193, if applicable. Because the 1997 ozone NAAQS has been revoked, no new requirements associated with that NAAQS would come due at any future date.

Comment: One commenter objected to the use of the redesignation substitute mechanism and the implications of such an action. The commenter incorporates by reference the relevant portions of a brief filed in a petition challenging the EPA's promulgation of the redesignation substitute. *See South Coast Air Quality Mgmt. Dist.* v. *EPA,* No. 15–1115 (D.C. Cir.). They contend that the HGB area continues to have unhealthy levels of ozone pollution, therefore, raising the NNSR thresholds and lowering the offset requirements for the area is inappropriate. The commenter further states that our action will result "in great expense and inefficiency: because some sources will not prevent pollution, they and other sources may have to retrofit at greater expense." The commenter asks the EPA to either disapprove the redesignation substitute or delay action until the underlying litigation is resolved.

Response: The EPA disagrees with the commenter that it is inappropriate to approve redesignation substitutes for the Houston-Galveston-Brazoria area for the 1997 ozone standard. As the commenter noted, the EPA created the redesignation substitute in the 2008 ozone SIP Requirements Rule as one of two acceptable procedures through which a state may demonstrate that it is no longer required to adopt any additional applicable requirements for an area which have not already been approved into the SIP for a revoked ozone NAAQS. 80 FR 12264, 12304 (March 6, 2015).

The EPA acknowledges that this rule has been challenged in the D.C. Circuit by the commenter. However, the rule has not been stayed pending resolution of the litigation, and as such, it is appropriate to continue to implement the 2008 ozone SIP Requirements Rule during the pendency of the litigation.

The EPA believes the redesignation substitute is an appropriate mechanism because it serves as a successor to a redesignation to attainment, for which these areas would have been eligible if the EPA had not revoked the 1-hour and 1997 ozone standards. For a more detailed description of why the EPA has determined the HGB area has met the redesignation criteria for the revoked 1997 ozone standard, see 81 FR 33166 for the proposal and Technical Support Document. Upon approval of a redesignation substitute, a state may request to revise its SIP to shift regulatory anti-backsliding requirements contained in the active portion of the SIP to the contingency measures portion of the SIP, subject to a showing of consistency with the general anti-backsliding checks in CAA sections 110(l) and 193 (if applicable). The EPA approval of the redesignation substitute has the same effect on these areas' nonattainment regulatory anti-backsliding requirements as would a redesignation to attainment for the revoked standard. The EPA believes that, under any view of anti-backsliding for a revoked standard, it should not mean imposing requirements greater than those that would apply if the standard had not been revoked.

An approvable redesignation substitute must include more than a determination of attainment of the prior NAAQS, and show that it addresses redesignation criteria for that NAAQS. Moreover, the state remains subject to ongoing requirements to meet the new more stringent 2008 ozone standard in that area. In this context, the EPA believes finalizing this action is appropriate—it recognizes and supports Texas's progress in having attained the

[1] *See* Section D of the TSD for this action in the docket for this rulemaking for additional information.

[2] *See* Final Implementation Rule for 2008 Ozone Standard, 80 FR 12264, at 12299, footnote 83 and at 12304, footnote 91.

prior standards in the HGB area due to permanent and enforceable emissions reductions, and reinforces continued attainment by demonstrating that the HGB area can maintain the revoked standard. See 80 FR 12264, 12305.

III. Final Action

We find that Texas has successfully demonstrated it has met the requirements for approval of a redesignation substitute for the revoked 1997 8-hour ozone NAAQS for the HGB area. We are approving the redesignation substitute for the HGB area based on our determination that the demonstration provided by the State of Texas shows that the HGB area has attained the revoked 1997 8-hour ozone NAAQS due to permanent and enforceable emission reductions, and that it will maintain that NAAQS for ten years from the date of the EPA's approval of this demonstration. As we no longer redesignate nonattainment areas to attainment for the revoked 1997 8-hour ozone NAAQS, approval of the demonstration serves as a redesignation substitute under the EPA's implementing regulations. As a result of this action, Texas is no longer required to adopt any additional applicable 1997 8-hour ozone NAAQS requirements for the area which have not already been approved into the SIP (40 CFR 51.1105(b)(1)). It also allows the state to request that the EPA approve the shifting of planning and control requirements implemented pursuant to the 1997 ozone NAAQS from the active portion of the SIP to the contingency measures portion of the SIP, upon a showing of consistency with CAA sections 110(l) and 193 (if applicable) (40 CFR 51.1105(b)(2)).

We are also finalizing a non-substantive technical correction to 40 CFR 81.344 (Section 107 Attainment Status Designations for Texas) to reflect our previous approval of a HGB area redesignation substitute demonstration for the revoked 1-hour ozone standard.

IV. Statutory and Executive Order Reviews

Under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011), this action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001). This action merely approves a demonstration provided by the State of Texas and finds that the HGB area is no longer subject to the regulatory anti-backsliding requirements under the principles of CAA section 172(e) for the revoked 1997 8-hour ozone NAAQS; and imposes no additional requirements. Accordingly, I certify that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule does not impose any additional enforceable duties, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). This rule also does not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely approves a demonstration provided by the State of Texas and find that the HGB area is no longer subject to the regulatory anti-backsliding requirements under the principles of CAA section 172(e) for the revoked 1997 8-hour ozone NAAQS; and does not alter the relationship or the distribution of power and responsibilities established in the CAA. This rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant.

The rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Additionally, this rule does not involve establishment of technical standards, and thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply.

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. The EPA has determined that this rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment.

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 9, 2017. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Volatile organic compounds.

40 CFR Part 81

Environmental protection, Air pollution control.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: October 27, 2016.

Samuel Coleman,

Acting Regional Administrator, Region 6.

40 CFR parts 52 and 81 are amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart SS—Texas

■ 2. Section 52.2275 is amended by adding paragraph (n) to read as follows:

§ 52.2275 Control strategy and regulations: Ozone.

* * * * *

(n) *Approval of Redesignation Substitute for the Houston-Galveston-Brazoria 1997 Ozone Nonattainment Area.* EPA has approved the redesignation substitute for the Houston-Galveston-Brazoria 1997 ozone NAAQS nonattainment area submitted by the State of Texas on August 18,

2015. The State is no longer being required to adopt any additional applicable 1997 ozone NAAQS requirements for the area.

PART 81—DESIGNATION OF AREAS FOR AIR QUALITY PLANNING PURPOSES

■ 3. The authority citation for part 81 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

■ 4. Section 81.344 is amended:

■ a. In the table for "Texas—Ozone (1-Hour Standard)" by revising the entries for "Houston-Galveston-Brazoria, TX" and revising footnote 4; and

■ b. In the table for "Texas—1997 8-Hour Ozone NAAQS (Primary and Secondary)" by revising the entries for "Houston-Galveston-Brazoria, TX" and adding footnote 7.

The revisions and additions read as follows:

§ 81.344 Texas.

* * * * *

TEXAS—OZONE [2]

[11-Hour standard]

Designated area	Designation		Classification	
	Date [1]	Type	Date [1]	Type
* * * * * * *				
Houston-Galveston-Brazoria Area, TX:				
Brazoria County [4]		Nonattainment	11/15/90	Severe-17.
Chambers County [4]		Nonattainment	11/15/90	Severe-17.
Fort Bend County [4]		Nonattainment	11/15/90	Severe-17.
Galveston County [4]		Nonattainment	11/15/90	Severe-17.
Harris County [4]		Nonattainment	11/15/90	Severe-17.
Liberty County [4]		Nonattainment	11/15/90	Severe-17.
Montgomery County [4]		Nonattainment	11/15/90	Severe-17.
Waller County [4]		Nonattainment	11/15/90	Severe-17.
* * * * * * *				

[1] This date is October 18, 2000, unless otherwise noted.

[2] The 1-hour ozone standard is revoked effective June 15, 2005 for all areas in Texas except the San Antonio area where it is revoked effective April 15, 2009.

* * * * * * *

[4] A Redesignation Substitute was approved on October 20, 2015.

* * * * *

TEXAS—1997 8-HOUR OZONE NAAQS

[Primary and secondary]

Designated area	Designation [a]		Classification	
	Date [1]	Type	Date [1]	Type
* * * * * * *				
Houston-Galveston-Brazoria, TX:				
Brazoria County [7]		Nonattainment	(4)	Subpart 2/Severe 15.
Chambers County [7]		Nonattainment	(4)	Subpart 2/Severe 15.
Fort Bend County [7]		Nonattainment	(4)	Subpart 2/Severe 15.
Galveston County [7]		Nonattainment	(4)	Subpart 2/Severe 15.
Harris County [7]		Nonattainment	(4)	Subpart 2/Severe 15.
Liberty County [7]		Nonattainment	(4)	Subpart 2/Severe 15.
Montgomery County [7]		Nonattainment	(4)	Subpart 2/Severe 15.
Waller County [7]		Nonattainment	(4)	Subpart 2/Severe 15.
* * * * * * *				

[a] Includes Indian Country located in each county or area, except as otherwise specified.

[1] This date is June 15, 2004, unless otherwise noted.

* * * * * * *

[4] Effective October 31, 2008.

* * * * * * *

[7] A Redesignation Substitute was approved on November 8, 2016.

* * * * *

[FR Doc. 2016–26586 Filed 11–7–16; 8:45 am]

BILLING CODE 6560–50–P

Message

From: matthew.kuryla@bakerbotts.com [matthew.kuryla@bakerbotts.com]
Sent: 11/14/2017 4:19:42 PM
To: Patrick, Monique [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3f271920363c4aecbff1e989a6dfde9b-MPATRICK]
CC: Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]
Subject: RE: meeting

11/16 at 3:30 pm eastern works for us. A call is probably fine. Will you send us a dialin?

From: Patrick, Monique [mailto:Patrick.Monique@epa.gov]
Sent: Tuesday, November 14, 2017 9:31 AM
To: Kuryla, Matthew
Cc: Schwab, Justin
Subject: RE: meeting

Hello Matt,

Here are the times Justin is available:

11/15: 9:00 am – 10:30 am and 5:00 pm – 6:00 pm
11/16: 9:00 am – 10:00 am, 11:15 am – 12:00 pm and 3:30 pm – 6:00 pm
11/17: 9:00 am – 11:00 am, 12:00 pm – 1:00 pm, 2:00 pm – 3:00 pm and 4:00 pm – 6:00 pm

Please let me know if you need times from next week too.

From: Patrick, Monique
Sent: Tuesday, November 14, 2017 9:40 AM
To: 'matthew.kuryla@bakerbotts.com' <matthew.kuryla@bakerbotts.com>
Cc: Schwab, Justin <schwab.justin@epa.gov>
Subject: RE: meeting

I will send you times shortly.

Thank you,

Monique S. Patrick
Program Specialist
Notary Public
Environmental Protection Agency
Office of General Counsel
Immediate Office
1200 Pennsylvania Avenue NW
Washington, DC 20460
Main #564-8064
Direct #564-5534

From: matthew.kuryla@bakerbotts.com [mailto:matthew.kuryla@bakerbotts.com]
Sent: Tuesday, November 14, 2017 9:15 AM
To: Patrick, Monique <Patrick.Monique@epa.gov>
Cc: Schwab, Justin <Schwab.Justin@epa.gov>
Subject: meeting

Monique, we would like to schedule a time to talk with Justin and others. I'm thinking that we would come to your offices. We have some others down here that we'd like to include. What two or three times work best for Justin?

Matt Kuryla
Partner

Baker Botts L.L.P.
matthew.kuryla@bakerbotts.com

Ex. 6

910 Louisiana Street
Houston, Texas 77002
USA

BAKER BOTTS

Message

From: matthew.kuryla@bakerbotts.com [matthew.kuryla@bakerbotts.com]
Sent: 11/14/2017 4:11:59 PM
To: Patrick, Monique [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3f271920363c4aecbff1e989a6dfde9b-MPATRICK]
CC: Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]
Subject: RE: meeting

Checking – thanks!

From: Patrick, Monique [mailto:Patrick.Monique@epa.gov]
Sent: Tuesday, November 14, 2017 9:31 AM
To: Kuryla, Matthew
Cc: Schwab, Justin
Subject: RE: meeting

Hello Matt,

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Please let me know if you need times from next week too.

From: Patrick, Monique
Sent: Tuesday, November 14, 2017 9:40 AM
To: 'matthew.kuryla@bakerbotts.com' <matthew.kuryla@bakerbotts.com>
Cc: Schwab, Justin <schwab.justin@epa.gov>
Subject: RE: meeting

I will send you times shortly.

Thank you,

Monique S. Patrick
Program Specialist
Notary Public
Environmental Protection Agency
Office of General Counsel
Immediate Office
1200 Pennsylvania Avenue NW
Washington, DC 20460
Main #564-8064
Direct #564-5534

From: matthew.kuryla@bakerbotts.com [mailto:matthew.kuryla@bakerbotts.com]
Sent: Tuesday, November 14, 2017 9:15 AM
To: Patrick, Monique <Patrick.Monique@epa.gov>
Cc: Schwab, Justin <Schwab.Justin@epa.gov>
Subject: meeting

Monique, we would like to schedule a time to talk with Justin and others. I'm thinking that we would come to your offices. We have some others down here that we'd like to include. What two or three times work best for Justin?

Matt Kuryla
Partner

Baker Botts L.L.P.
matthew.kuryla@bakerbotts.com

Ex. 6

910 Louisiana Street
Houston, Texas 77002
USA

BAKER BOTTS

Message

From: Sahay, Shailesh [Shailesh.Sahay@POET.COM]
Sent: 4/27/2018 10:56:37 PM
To: Gunasekara, Mandy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=53d1a3caa8bb4ebab8a2d28ca59b6f45-Gunasekara,]
CC: Lewis, Josh [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b22d1d3bb3f84436a524f76ab6c79d7e-JOLEWIS]; Atkinson, Emily [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=bb2155adef6a44aea9410741f0c01d27-Atkinson, Emily]; Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]
Subject: Thanks and follow-up meeting

Mandy and Justin,

Thanks so much for connecting today regarding POET's corn fiber RFS pathway application and other issues.` As we discussed, I'm writing to follow up and request a meeting with Assistant Administrator Wehrum with respect to our application.

We envision the following attendees, though this list is subject to change based on the particular date we settle on:

- Jeff Lautt, President and Chief Operating Officer
- Mary Frontczak, General Counsel and SVP
- Kyle Gilley, SVP
- Dave Bushong, SVP
- Shai Sahay (me), Senior Regulatory Counsel

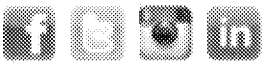
Please let us know which dates might make sense, and thanks for your ongoing hard work at the Agency.

Best,
Shai

Shailesh Sahay
Senior Regulatory Counsel

POET
900 7th Street NW, Suite 820
Washington, DC 20001
Ex. 6
F/ +1 (202) 735-5430
Ex. 6

poet.com



Message

From: mark.hamlin@bakerbotts.com [mark.hamlin@bakerbotts.com]
Sent: 5/25/2018 9:03:24 PM
To: alan.greenberg@usdoj.gov [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=usercbd2f880]
CC: Aaron.Streett@BakerBotts.com; matthew.kuryla@bakerbotts.com [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=0f258c275a5c45119dd6a95a93f7b41e-matthew.kuryla@bakerbotts.com]; Ting, Kaytrue [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=65b5a3451a7347b585ced174b38948ad-Ting, Kaytrue]; Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]; austin.echols@bakerbotts.com
Subject: RE: Downwinders at Risk v. EPA, Fifth Circuit, petition filed 4/19/18
Attachments: Sierra Club de Puerto Rico_MTD.PDF; Sierra Club de Puerto Rico_Response to MTD.PDF; Sierra Club de Puerto Rico_Opinion.pdf; Sierra Club de Puerto Rico v EPA (Petitioner Final Brief).pdf; Sierra Club de Puerto Rico v EPA (Respondent Final Brief).pdf

Alan,

Following up on our conversation this afternoon, please find attached the final briefs, motion to dismiss and response, and the D.C. Circuit's opinion in *Sierra Club de Puerto Rico v. EPA*.

Regards,
Mark

Mark Hamlin
Baker Botts L.L.P

Ex. 6

From: Greenberg, Alan (ENRD) <Alan.Greenberg@usdoj.gov>
Sent: Thursday, May 24, 2018 10:04 AM
To: Hamlin, Mark <mark.hamlin@bakerbotts.com>
Cc: Streett, Aaron <Aaron.Streett@BakerBotts.com>; Kuryla, Matthew <matthew.kuryla@bakerbotts.com>; Ting.Kaytrue@epa.gov
Subject: RE: Downwinders at Risk v. EPA, Fifth Circuit, petition filed 4/19/18

Mark:

I am available for a call any time after 11:30 am central time tomorrow.

Alan

From: mark.hamlin@bakerbotts.com <mark.hamlin@bakerbotts.com>
Sent: Thursday, May 24, 2018 8:52 AM
To: Greenberg, Alan (ENRD) <AGreenberg@ENRD.USDOJ.GOV>
Cc: Aaron.Streett@BakerBotts.com; matthew.kuryla@bakerbotts.com; Ting.Kaytrue@epa.gov
Subject: RE: Downwinders at Risk v. EPA, Fifth Circuit, petition filed 4/19/18

Alan,

Apologies for the delayed response to your email. Would you be available to participate in a call after 11:00 am central time tomorrow (5/25)? We would like Aaron to be able to participate, but he is unable to make a call today.

Regards,
Mark

Mark Hamlin
Baker Botts L.L.P

Ex. 6

From: Greenberg, Alan (ENRD) <Alan.Greenberg@usdoj.gov>
Sent: Wednesday, May 23, 2018 1:37 PM
To: Hamlin, Mark <mark.hamlin@bakerbotts.com>
Cc: Streett, Aaron <Aaron.Streett@BakerBotts.com>; Kuryla, Matthew <matthew.kuryla@bakerbotts.com>; Ting, Kaytrue <Ting.Kaytrue@epa.gov>
Subject: RE: Downwinders at Risk v. EPA, Fifth Circuit, petition filed 4/19/18

Mark:

I could participate in a call at 10:00 am or 1:00 pm central time tomorrow.

Thanks.

Alan

From: mark.hamlin@bakerbotts.com <mark.hamlin@bakerbotts.com>
Sent: Tuesday, May 22, 2018 4:29 PM
To: Greenberg, Alan (ENRD) <AGreenberg@ENRD.USDOJ.GOV>
Cc: Aaron.Streett@BakerBotts.com; matthew.kuryla@bakerbotts.com
Subject: RE: Downwinders at Risk v. EPA, Fifth Circuit, petition filed 4/19/18

JDG Communication - Subject to Join Defense Privilege

Alan,

Following up on conversations from yesterday and this morning, the BCCA Appeal Group had targeted May 29 as the deadline for filing a motion to dismiss or, in the alternative, to hold the matter in abeyance. This target date is not based upon a specific deadline requirement for motions under the Federal Rules of Appellate Procedure or the Circuit Rules. Instead, we targeted this date as it represents that latest date by which EPA must file the administrative record with the court, after which briefing schedules will be set. *See* FRAP 17.

With respect to the content of the motion, the BCCA Appeal Group still anticipates requesting a dismissal on the grounds that the Petitioners' claim is not based solely on after-arising grounds and is, therefore, time-barred. Included below is a provisional outline of our intended argument for dismissal.

Would you be available for a follow-up call this Thursday, May 24? We can be available at 9:00 am, 10:00 am, or 1:00 pm CT. Please let me know if you can make any of these times and I will get the call on everyone's calendar.

Statutory Background

- A petition for judicial review of an EPA rulemaking must be filed within 60 days of the notice of the rulemaking *unless* the grounds for the petition are based *solely* on grounds arising after the sixtieth day. CAA §307(b)(1) (emphasis added).
- Petitioners do not contest that their petition falls outside the 60-day limitations period. Instead, Petitioners assert that the decision in *South Coast Air Quality Management District v. EPA*, 882 F.3d 1138 (D.C. Cir. 2018), establishes after-arising grounds that permit judicial review.

Caselaw Analyzing After-Arising Grounds

- As explained by the D.C. Circuit, it takes more than a new factual development to establish after-arising grounds. *Sierra Club de Puerto Rico v. EPA*, 815 F.3d 22, 27 (D.C. Cir. 2016). Instead, the court looks to whether the petitioners' claimed injuries would have been speculative and deprived the court of jurisdiction under Article III if brought within the 60-day limitations period. *Id.*
- Stated more simply, the court looks to whether the petitioners could have raised their merits argument prior to the asserted after-arising grounds. *Honeywell International, Inc. v. EPA*, 705 F.3d 470 (D.C. Cir. 2013). If the claim was ripe for review within the 60-day limitations period, it is time-barred if brought thereafter.

Petitioners' Prior Challenges to the Redesignation Substitute

- Petitioners' brief in *South Coast*:
  - In March 2016, Petitioners filed a brief in their challenge to the 2008 ozone NAAQS implementation rule that asserted that the Clean Air Act did not grant EPA the authority to create the redesignation substitute mechanism as an alternative to formal redesignation under the Act.
  - Furthermore, Petitioners alleged that the relaxation of control measures under the revoked standards through the redesignation substitute mechanism "allow[s] weaker protections in communities that violate the new standard and have a history of violating prior standards."
- Petitioners' comments on the Texas redesignation substitute rulemakings:
  - In June 2016, Petitioners raised similar objections to the Texas redesignation substitutes as were made in their brief in *South Coast*, discussed above. Indeed, Sierra Club's comments specifically state that "[t]he 'redesignation substitute' is illegal and arbitrary and for all the reasons given in [the Petitioners' *South Coast*] brief, the relevant portions of which are incorporated by reference."
  - Petitioners' comments further allege that "residents in these communities will continue to breathe unsafe air" were EPA to approve the redesignation substitutes.

Petitioners' Claim was Ripe for Review Within the 60-day Limitations Period

- The Petitioners' prior objections to the redesignation substitute mechanism did not depend upon future or speculative actions or injuries.
- Instead, Petitioners could have petitioned a court to find the redesignation substitutes were inconsistent with the Clean Air Act within the 60-day limitations period.
- Furthermore, any alleged injury in connection with EPA's approval of a redesignation substitute would be realized upon the rulemaking's effective date.
- Accordingly, petitioners were capable of raising their merits argument and establishing Article III standing within the 60-day limitations period.

Petitioners' Claim is Time-Barred

- As demonstrated above, the Petitioners could have petitioned for judicial review of the Texas redesignation substitutes within the 60-day limitations period.
- Petitioners now assert that the *South Coast* decision represents after-arising grounds, but this decision has not created grounds for a substantive argument that could not have brought within the 60-day limitations period.
- The mere issuance of judicial precedent that bolsters a substantive argument for challenging agency action does not constitute an after-arising ground when the substantive argument itself was available within the statutory timeframe for petitioning for judicial review.
- Accordingly, the *South Coast* decision does not establish after-arising grounds.

- Finally, even if the *South Coast* decision could establish after-arising grounds—which we dispute—it certainly could not do so before the mandate issues and the decision has become effective.
- Accordingly, Petitioners' claim is not based upon after-arising grounds and should be dismissed as time-barred.

Abeyance as an Alternative to Dismissal

- Were the court to deny a request for dismissal, the BCCA Appeal Group would support a request to hold the case in abeyance pending either (1) resolution of the petition for rehearing in the D.C. Circuit and any subsequent appeal or (2) resolution of the administrative petition for reconsideration of the redesignation substitutes.

Mark Hamlin
Baker Botts L.L.P

Ex. 6

From: Kuryla, Matthew
Sent: Tuesday, May 22, 2018 9:53 AM
To: Greenberg, Alan (ENRD) <Alan.Greenberg@usdoj.gov>
Cc: Hamlin, Mark <mark.hamlin@bakerbotts.com>; Streett, Aaron <Aaron.Streett@BakerBotts.com>
Subject: RE: Downwinders at Risk v. EPA, Fifth Circuit, petition filed 4/19/18

Yes. Apologies – we identified no deadline, but just your administrative record date, which is on the same timeframe.

We will outline our additional thoughts shortly about **Exemption 5**

From: Greenberg, Alan (ENRD) <Alan.Greenberg@usdoj.gov>
Sent: Tuesday, May 22, 2018 9:28 AM
To: Kuryla, Matthew <matthew.kuryla@bakerbotts.com>
Cc: Hamlin, Mark <mark.hamlin@bakerbotts.com>; Streett, Aaron <Aaron.Streett@BakerBotts.com>
Subject: RE: Downwinders at Risk v. EPA, Fifth Circuit, petition filed 4/19/18

Matt:

Did you have a chance to confer with your colleagues about the source of any potential deadline for a motion to dismiss?

Thanks. Alan

From: matthew.kuryla@bakerbotts.com <matthew.kuryla@bakerbotts.com>
Sent: Wednesday, May 16, 2018 2:20 PM
To: Greenberg, Alan (ENRD) <AGreenberg@ENRD.USDOJ.GOV>
Cc: mark.hamlin@bakerbotts.com; Aaron.Streett@BakerBotts.com
Subject: Re: Downwinders at Risk v. EPA, Fifth Circuit, petition filed 4/19/18

Thanks, Alan. We would also like to discuss a motion to dismiss on the basis of untimeliness. Can we set a call early next week on that?

Sent from my iPhone

On May 16, 2018, at 11:36 AM, Greenberg, Alan (ENRD) <Alan.Greenberg@usdoj.gov> wrote:

> Matt:

You can represent that EPA will not oppose your clients' motion to intervene.

Alan

From: matthew.kuryla@bakerbotts.com <matthew.kuryla@bakerbotts.com>
Sent: Wednesday, May 16, 2018 9:20 AM
To: mark.hamlin@bakerbotts.com; Greenberg, Alan (ENRD) <AGreenberg@ENRD.USDOJ.GOV>
Cc: Aaron.Streett@BakerBotts.com
Subject: RE: Downwinders at Risk v. EPA, Fifth Circuit, petition filed 4/19/18

Alan, just following up. We intend to file a motion for leave to intervene in this case on behalf of the BCCA Appeal Group, the Texas Chemical Council and the Texas Oil and Gas Association. Will EPA take a position on it?

From: Hamlin, Mark
Sent: Monday, May 14, 2018 1:24 PM
To: 'alan.greenberg@usdoj.gov' <alan.greenberg@usdoj.gov>
Cc: Kuryla, Matthew <matthew.kuryla@bakerbotts.com>; Streett, Aaron <Aaron.Streett@BakerBotts.com>
Subject: Downwinders at Risk v. EPA, Fifth Circuit, petition filed 4/19/18

Alan,

We represent an industry coalition that anticipates filing a motion intervene in support of Respondent EPA in *Downwinders at Risk v. EPA*, No. 18-60290 (5th Cir.). This case represents the challenge to EPA's rulemakings approving "redesignation substitutes" for the Dallas-Fort Worth and Houston-Galveston-Brazoria areas. At your earliest convenience, can you please let me know your client's position on this motion so is can be included in the motion.

Thank you,
Mark

Mark Hamlin | *Associate* | **Baker Botts LLP**
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ORAL ARGUMENT REQUESTED, NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-1138

SIERRA CLUB DE PUERTO RICO, CIUDADANOS EN DEFENSA DEL AMBIENTE, MADRES DE NEGRO DE ARECIBO, AND COMITÉ BASURA CERO ARECIBO,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY AND GINA MCCARTHY IN HER OFFICIAL CAPACITY AS ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondents,

ENERGY ANSWERS ARECIBO, LLC,

Intervenor Respondent.

Petition for Review of a Final Rule of the
United States Environmental Protection Agency

OPENING BRIEF OF PETITIONERS

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Attorney for Petitioners

Dated: August 31, 2015

PETITIONERS' CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with Circuit Rule 28(a)(1), the Sierra Club de Puerto Rico, Ciudadanos en Defensa del Ambiente, Madres de Negro de Arecibo, and Comité Basura Cero Arecibo (collectively, "Petitioners") hereby certify as follows:

(A) Parties and Amici

Petitioners:

Sierra Club de Puerto Rico
Ciudadanos en Defensa del Ambiente
Madres de Negro de Arecibo
Comité Basura Cero Arecibo

Respondents:

United States Environmental Protection Agency
Gina McCarthy, Administrator of the U.S. Environmental Protection Agency

Intervenors:

Energy Answers Arecibo, LLC

Amici:

none

(B) Ruling Under Review

The present case seeks review of the nationally applicable final rule promulgated by the United States Environmental Protection Agency ("EPA") titled *Requirements for Preparation, Adoption, and Submittal of SIPs; Approval and Promulgation of State Implementation Plans*, published at 45 Fed. Reg. 31,307,

31,312 (May 13, 1980), JA19, 23. This rule is now codified at 40 C.F.R. §51.165(a)(2)(i), JA24-25. With respect to the decision of the Environmental Appeals Board dated March 25, 2014, this appeal is addressed to its reasoning that Nonattainment New Source Review does not apply to this incinerator, based on EPA's rule. Board Opinion 22–28, JA265-271.

(C) Related Cases

Petitioners appealed the grant of a permit to construct to Energy Answers Arecibo, LLC ("Energy Answers") under the Prevention of Significant Deterioration program in *In re: Energy Answers Arecibo, LLC (Arecibo Puerto Rico Renewable Energy Project),* Prevention of Significant Deterioration Appeal Nos. 13-05–13-09 (Environmental Appeals Board, U.S. Environmental Protection Agency). The Board made a decision in favor of Energy Answers.

Petitioners are not aware of any other related cases pending before this court or any other court.

PETITIONERS' RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, D.C. Circuit Rule 26.1, and the Clerk's Order of July 21, 2014, Petitioners make the following disclosures.

Sierra Club de Puerto Rico. Sierra Club de Puerto Rico is a chapter of Sierra Club, a national nonprofit corporation organized and existing under the laws of the State of California that is dedicated to the protection and enjoyment of the environment. Sierra Club has no parent corporations and no publicly held company has a 10% or greater ownership interest in Sierra Club.

Ciudadanos en Defensa del Ambiente. Ciudadanos en Defensa del Ambiente, also known as Ciudadanos en Defensa del Ambiente, Inc., is a non-profit organization incorporated in the Department of State of the Commonwealth of Puerto Rico. Since its founding in 1993, it has been dedicated to the protection of the environment and natural resources and the right of communities to a healthy environment in Puerto Rico, particularly in the region of Arecibo. It has no parent corporations, and no publicly held company has a 10% or greater ownership interest in it.

Madres de Negro de Arecibo. Madres de Negro de Arecibo is an association of Arecibo residents dedicated to the protection and enjoyment of the environment and the health in Arecibo, through education and opposition to the incineration of solid wastes being proposed by Energy Answers Arecibo, LLC. No

publicly held company has a 10% or greater ownership interest in it. No members of the association have issued shares or debt securities to the public.

Comité Basura Cero Arecibo. Comité Basura Cero Arecibo is a chapter of Basura Cero Puerto Rico, Inc., a non-profit corporation organized and existing under the laws of Puerto Rico, and dedicated to the protection of the environment and health through the promotion of the goal of zero wastes and the opposition to the incineration and disposal of wastes. Basura Cero Puerto Rico, Inc. has no parent corporations, and no publicly held company has a 10% or greater ownership interest in it.

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TABLE OF AUTHORITIES[1]

CASES

[1] Authorities upon which we chiefly rely are marked with asterisks (*).

STATUTES

Clean Air Act, 42 U.S.C. §§7401 *et seq.*

CODE OF FEDERAL REGULATIONS

FEDERAL REGISTER

OTHER AUTHORITIES

GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Acronym/Abbreviation	English
CAA	Clean Air Act
EPA	United States Environmental Protection Agency
Pb	lead
SIP	State Implementation Plan

STATEMENT OF JURISDICTION

The petition seeks judicial review of the nationally applicable final rule of the Environmental Protection Agency ("EPA") entitled *Requirements for Preparation, Adoption, and Submittal of SIPs; Approval and Promulgation of State Implementation Plans*, 45 Fed. Reg. 31,307, 31,312 (May 13, 1980), JA19, 23. This rule is now codified at 40 C.F.R. §51.165(a)(2)(i). The Court has jurisdiction under Section 307(b)(1) of the Clean Air Act, 42 U.S.C. §7607(b)(1).

EPA has made a motion to dismiss, arguing that this legal challenge is not ripe or timely. We address EPA's argument in Point II of our Argument below, pages 19–25, 26–28.

STATUTES AND REGULATIONS

Pertinent statutes and regulations appear in a statutory addendum to this brief, separately bound.

ISSUES FOR REVIEW

1. Under its final rule at 45 Fed. Reg. 31,307 (May 13, 1980), as codified at 40 C.F.R. §51.165(a)(2)(i), EPA limits the preconstruction review program for nonattainment areas under Sections 172(c)(5) and 173 of the Clean Air Act to a new major stationary source "that is major for the pollutant for which the area is designated nonattainment." Is EPA's rule arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law? 42 U.S.C. §7607(d)(9)(A).

2. Is EPA's rule invalid under Step One of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)?

3. Is EPA's rule invalid under Step Two of *Chevron*?

BACKGROUND

I. Procedural History

A. Designation of the Lead Nonattainment Area in Arecibo, Puerto Rico.

In 2011, EPA designated a part of the municipality of Arecibo as nonattainment for lead. 76 Fed. Reg. 72,097, 72,119 (Nov. 22, 2011), JA117, 119; 40 C.F.R. §81.355.[2] This designation applies to the "[a]rea bounded by 4 km from the boundaries of the Battery Recycling Company facility." *Id.* This means that this part of Arecibo is not in attainment with the national ambient air quality standards for lead. *See* 42 U.S.C. §7407(d)(1)(A).

B. Incinerator's Potential to Emit for Lead and Lack of Viable Offsets.

Energy Answers Arecibo, LLC ("Energy Answers") seeks to construct an incinerator in this nonattainment area. EPA Fact Sheet, Prevention of Significant Deterioration Draft Permit 3, JA178; Prevention of Significant Deterioration Air Quality Modeling Analysis Amendment 2 (Feb. 2012), JA164. The incinerator would release lead emissions into the air. Prevention of Significant Deterioration

[2] The island of Puerto Rico is one air quality control region. 40 C.F.R. §81.77.

Permit Application, Section 5.2.10, 5-37 ("Lead is present in refuse and is released as fumes and fine particulate matter during combustion"), JA156. It is Petitioners' position that Energy Answers may not construct and operate the proposed incinerator because it is unable to obtain the offsets of lead emissions required under the Nonattainment New Source Review Program. *See* 42 U.S.C. §7503(a)(1)(A), (c). This is because the incinerator would release more lead emissions than the battery recycling facility that caused the lead nonattainment problem.

Assuming operation for every hour of the year (8,760 hours), Energy Answers lists potential lead emissions as 0.31 tons/year from two boilers each having potential emissions of 0.153 tons/year. Prevention of Significant Deterioration Permit Application 3-4, Table 3-1, JA130. This is equal to 620 pounds per year.[3] The incinerator will actually operate at 95% availability, or 8,322 hours per year. *Id.*, Section 3.1.1, 3-1, JA127. In addition, each boiler will operate between a range of emissions rates for lead—a minimum rate of 0.028 pounds/hr and a maximum rate of 0.038 pounds/hr. *Id.*, Appendix A-Table 2, JA157. Therefore, minimum actual emissions from the combined boilers will be 466 pounds per year,[4] and maximum actual emissions from the combined boilers

[3] 0.31 tons/year x 2,000 pounds/ton = 620 pounds/year.
[4] 2 boilers x 8,322 hour/year x 0.028 pounds/hour = 466 pounds/year.

will be 632 pounds per year.[5] These potential emissions are greater than the actual emissions of lead from the battery recycling facility for each of the years 2007–2013. EPA Envirofacts Report (July 4, 2013), JA222-226; EPA Envirofacts Report (Sept. 22, 2014), JA354-358. There are a limited number of sources contributing to the lead nonattainment problem, the major one being the battery recycling facility. Letter from EPA Region 2 to Governor of Puerto Rico (June 14, 2011), Technical Support Document 4, Table 3, JA217 (identifying two sources of lead emissions: the battery recycling facility and the Puerto Rico Electric Power Authority).

C. **Incinerator's Potential to Emit for Attainment Pollutants.**

Because it is capable of charging more than 50 tons of waste per day, the incinerator is a specified source and is therefore subject to the lower 100 tons/year threshold for review under the Prevention of Significant Deterioration program. Final Permit 22, JA347 (limiting fuel consumption rate to 2,106 tons per day). Under the final permit, the incinerator has allowable emissions greater than the 100 tons/year threshold for five air pollutants. Final Permit 7, JA346 (listing annual emissions limitations of 357 tons/year for carbon monoxide, 352 tons/year for nitrogen oxides, 260 tons/year for sulfur dioxide, 124 tons/year for hydrogen

[5] 2 boilers x 8,322 hour/year x 0.038 pounds/hour = 632 pounds/year.

chloride, and 104 tons/year for coarse particulates). Therefore, these potential emissions make it a "major emitting facility" under the Prevention of Significant Deterioration program. Data submitted by Energy Answers in its permit application support the conclusion that it is a "major emitting facility" for these pollutants. Prevention of Significant Deterioration Permit Application 3-4, Table 3-1, JA130.

D. Permit Application and EPA's Response to Comments (Prevention of Significant Deterioration program).

EPA is the permitting authority for the Prevention of Significant Deterioration program in Puerto Rico. 40 C.F.R. §52.2729 (state provisions not approvable). In approving Energy Answers' application, EPA asserted that the incinerator is not subject to Nonattainment New Source Review, based on its rule limiting the pollutants whose potential to emit may trigger this program, to only nonattainment pollutants. EPA Response to Comments 99 (¶5), 107–08 (comment 2), JA207, 208-209.[6]

[6] EPA also concluded that the incinerator is not subject to Nonattainment New Source Review because its projected lead emissions of 0.31 tons/year are less than a Significant Emission Rate of 0.6 tons/year. *See* EPA Response to Comments 107–08, comment 2, JA208-209. But if the Court grants Petitioners the relief requested and vacates EPA's rule, the facility will be subject to Nonattainment New Source Review by virtue of its potential to emit for at least five other air pollutants—carbon monoxide, nitrogen oxides, sulfur dioxide, hydrogen chloride, and coarse particulates. Therefore, any Significant Emission Rate for lead would

E. Permit and EPA's Final Agency Action (Prevention of Significant Deterioration program).

Following a public comment period, EPA granted a permit to Energy Answers. Petitioners filed a Petition for Review with the Environmental Appeals Board, which included arguments why EPA's rule is unlawful. Petition for Review to Environmental Appeals Board 21–33 (July 22, 2013), JA264-276. On March 25, 2014, the Environmental Appeals Board denied the petition for review and rejected those arguments. Board Opinion 22–28, JA265-271. On May 19, 2014, EPA published notice of its final agency action granting a final permit to Energy Answers. 79 Fed. Reg. 28,710, 28,712 (May 19, 2014), JA120, 122.

F. Petitioners' Legal Challenge to EPA's Rule.

Petitioners filed a petition for review on July 17, 2014, within 60 days of the publication of the notice in the Federal Register. They assert that EPA's rule at 45 Fed. Reg. 31,307, 31,312, currently codified at 40 C.F.R. §51.165(a)(2)(i), is invalid under the two-step test of *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842–43 (1984).

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not have any effect on the applicability of Nonattainment New Source Review to the incinerator.

II. Rulemaking History

A. Pre-1977 EPA Rulemakings.

Prior to the 1977 Clean Air Act Amendments, there was no statutory new source review program. But questions arose as to whether EPA would restrict the construction of new sources in nonattainment areas. In response, EPA issued an Interpretative Ruling establishing major source thresholds that would trigger certain restrictions. 41 Fed. Reg. 55,524 (Dec. 21, 1976), JA26. EPA set major source thresholds of 100 tons/year for certain pollutants except for carbon monoxide, set at 1,000 tons/year. *Id.* at 55,525, 55,528, column 1, JA27, 28. On the same date, EPA also proposed to cut the thresholds in half. 41 Fed. Reg. 55,558, 55,559, column 2 (Dec. 21, 1976), JA29-30. But Congress passed the 1977 amendments, which overshadowed these regulatory efforts.

B. 1977 Clean Air Act Amendments.

The 1977 Clean Air Act Amendments created a federal permitting program for new or modified stationary sources constructed after August 7, 1977. There are two parts to this program. The first is the Prevention of Significant Deterioration program, located at Sections 160–169B of the Clean Air Act. Pub. L. 95-95, 91 Stat. 685, 731–42; 42 U.S.C. §§7470–7492. The second is the Nonattainment New Source Review program, located at Sections 171–179B of the Clean Air Act. Pub. L. 95-95, 91 Stat. 685, 745–51; 42 U.S.C. §§7501–7509a.

To determine applicability, Congress provided a new statute-wide, uniform general definition of "major stationary source" and "major emitting facility." Pub. L. 95-95, 91 Stat. 685, 769–70. This is the same statutory language that exists today in Section 302(j):

> (j) Except as otherwise expressly provided, the terms ***"major stationary source" and "major emitting facility" mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant*** (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator).

42 U.S.C. §7602(j) (emphasis added). This threshold applies to all facilities, as there is no distinction between specified and unspecified sources. *See id.* "Major stationary source" and "major emitting facility" are defined synonymously. *See id.*

The Prevention of Significant Deterioration program under Section 165(a)(1) requires a permit for the construction of a new source in an air quality control region that is in attainment with any of the national ambient air quality standards. 42 U.S.C. §7475(a)(1). The national ambient air quality standards are uniform, national standards that apply to the six criteria pollutants, which include coarse and fine particulates (collectively, "particulates"), ozone, nitrogen oxides, sulfur dioxide, lead, and carbon monoxide. 40 C.F.R. §§50.1–50.18.

For the Prevention of Significant Deterioration program, Congress deviated from the general definition in Section 302(j) and provided a specific definition of

"major emitting facility." In Section 169(1), Congress defined a "major emitting facility" as a specified facility that emits or has the potential to emit 100 tons/year of any air pollutant, or any other source with a potential to emit 250 tons/year of any air pollutant. Pub. L. 95-95, 91 Stat. 685, 740–41; 42 U.S.C. §7479(1).

The Nonattainment New Source Review program under Sections 172 and 173 requires a permit for the construction of a new "major stationary source" in an air quality control region that is in nonattainment with any national ambient air quality standard. 42 U.S.C. §§7502(c)(5) ("Such plan provisions shall require permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area, in accordance with section 7503 of this title"), 7503(a) ("The permit program required by section 7502(b)(6) of this title shall provide that permits to construct and operate may be issued if . . . .").[7]

In contrast to the Prevention of Significant Deterioration program, Congress did not create a special definition of "major emitting facility" for Nonattainment New Source Review. Rather, it followed the general definition of "major stationary source" in Section 302. Pub. L. 95-95, 91 Stat. 685, 747 (requiring "permits for the construction and operation of new or modified stationary sources

[7] The reference to "Section 7502(b)(6)" in Section 7503(a) should read "Section 7502(b)(5)." Current Section 7502(b)(5) was originally located at Section 7502(b)(6). *See* Pub. L. 95-95, 91 Stat. 685, 747–48. In the 1990 amendments, Congress moved it to Section 7502(b)(5) but failed to amend the reference in Section 7503(a). *See* Pub. L. 101-549, 104 Stat. 2399, 2414–15 (Nov. 15, 1990).

in accordance with section 173 . . ."), 748 (imposing permit requirements for a "major stationary source"); 42 U.S.C. §§7502(c)(5), 7503(a), (c).

The legislative history reflects this dual approach. Four days before the passage of the 1977 Amendments, the House Report summarized that "preconstruction permits are required by the act for all new or modified major stationary sources, whether locating in significant deterioration or nonattainment areas." H.R. Rep. No. 95-564 (1977) (Conference Report), 1977 U.S.C.C.A.N. 1502, 1508, JA348, 350. While Congress generally defined "major stationary source" and "major emitting facility" synonymously, it modified the definition of "major emitting facility" for the Prevention of Significant Deterioration program:

> Defines major stationary source and major emitting facility as defined in the Senate bill. ***For the purposes of prevention of significant deterioration, a modification of this term is used***. That modification appears in the part on prevention of significant deterioration.

Id. at 1553 (emphasis added).

C. **Post-1977 EPA Rulemakings.**

Following the 1977 amendments, EPA acknowledged that the new statute-wide definition of Section 302(j) determines a "major stationary source" for triggering Nonattainment New Source Review. 43 Fed. Reg. 21,673, 21,675, column 3 (May 19, 1978) (Notice of Policy Memorandum acknowledging "requirement that permits be issued for the construction and operation of new or

modified major sources in accordance with Section 173 . . ."), JA31, 32. In an Emission Offset Interpretative Ruling, EPA revised the 1976 Interpretative Ruling to conform to this new statutory definition:

> Section 129(a) of the 1977 Amendments requires that the offset requirements be applicable to all major stationary sources (including Federal facilities) ***as defined in Section 302 of the Act*** (i.e. sources with potential emissions of 100 tons or more per year).

44 Fed. Reg. 3,274, 3,276, column 1 (Jan. 16, 1979) (emphasis added), JA39, 40. EPA continued to follow the statutory definition of "major stationary source" in subsequent rulemakings. General Preamble for Proposed Rulemaking, 44 Fed. Reg. 20,372, 20,375, column 1 (Apr. 4, 1979) ("Requirements for All Part D SIPs . . . Require preconstruction review permits for new major sources and major modifications of existing sources, to be issued in accordance with section 173 of the Act"), JA41, 42.

D. **EPA's Changing Interpretation.**

But in a series of steps, EPA moved toward limiting the pollutants whose potential to emit may trigger Nonattainment New Source Review, to nonattainment pollutants only. *See* Interpretive Rule, 44 Fed. Reg. 38,471 (July 2, 1979), JA43. The first step was a rule providing that restrictions on "major stationary source[s]" located in nonattainment areas apply only to facilities emitting nonattainment pollutants:

> After June 30, 1979, no major stationary source shall be constructed or modified in any nonattainment area (as designated in 40 CFR Part 81, Subpart C) ("nonattainment area") to which any state implementation plan applies, ***if the emissions from such facility will cause or contribute to concentrations of any pollutant for which a national ambient air quality standard is exceeded in such area***, unless, as of the time of application for a permit for such construction, such plan meets the requirements of part D, title I, of the Clean Air Act, as amended (42 USC 7501 *et seq.*) ("Part D").

Id. at 38,473, column 2 (emphasis added), JA44. Under that rule, a "major stationary source" emitting a nonattainment pollutant could not be constructed in a nonattainment area unless it had a permit under the Nonattainment New Source Review program. *See id.* at 38,473, column 3 ("The restrictions in paragraphs (a) and (b) apply only to major stationary sources of emissions that cause or contribute to concentrations of the pollutant for which the nonattainment area was designated as nonattainment"), JA44.

EPA went a step further in the preamble. It said the restriction applied "only to major sources of the pollutant for which the area was designated as nonattainment of Part D." *Id.* at 38,473, column 1, JA44. EPA repeated this new interpretation several months later in a preamble to a proposed rule for the Prevention of Significant Deterioration program. 44 Fed. Reg. 51,924, 51,941, column 1 (Sept. 5, 1979) ("Nonattainment review applicability again requires that the nonattainment pollutant be potentially emitted in major amounts"), JA45, 48.

E. **Final Rule, 45 Fed. Reg. 31,307 (May 13, 1980).**

Following the Court's decisions in *Alabama Power Company v. Costle,* 606 F.2d 1068 (D.C. Cir. 1979) ("*Alabama Power I*") and *Alabama Power Company v. Costle,* 636 F.2d 323 (D.C. Cir. 1979) ("*Alabama Power II*"), EPA published its final rule limiting pollutants whose potential to emit may trigger Nonattainment New Source Review, to only nonattainment pollutants. 45 Fed. Reg. 31,307, 31,312 (May 13, 1980), JA19, 23. In its original form, it read as follows:

> Each plan shall adopt a preconstruction review program to satisfy the requirements of Sections 172(b)(6) and 173 of the Act for any area designated as nonattainment for any national ambient air quality standard under 40 CFR 81.300 et seq. ***Such a program shall apply to any new major stationary source or major modification that is major for the pollutant for which the area is designated nonattainment, if the stationary source or modification would locate anywhere in the designated nonattainment area.*** A major stationary source or major modification that is major for volatile organic compounds is also major for ozone.

Id. at 31,312 (emphasis added), JA23. In the preamble, EPA paraphrased the rule as follows:

> The Clean Air Act generally requires review of each new major stationary source or major modification. Section 110(a)(2)(D). In particular, ***all such sources and modifications*** planning to locate ***in areas designated nonattainment for a pollutant for which the source or modification would be major*** [fn 3] ***must receive a permit*** to assure that they will not interfere with efforts to attain and maintain national standards and that they utilize suitable emissions control technology.

Id. at 31,308–09, JA20-21. Having set forth this interpretation, EPA amended its Emissions Offset Interpretive Ruling to make it consistent with this interpretation. *Id.* at 31,311, column 1, JA22.

F. **EPA's Divergent Interpretations.**

By 1980, EPA had divergent rules for triggering Prevention of Significant Deterioration review and Nonattainment New Source Review. Final Rules, 45 Fed. Reg. 52,676, 52,711 (Aug. 7, 1980), JA51, 53. To be subject to the former program, the "major emitting facility" determination was based on the potential to emit for any air pollutant. *Id.*, column 1. But to be subject to the latter program, the "major stationary source" determination was based only on the potential to emit for a nonattainment pollutant. *Id.*, columns 2–3.

G. **Relocation to Current 40 C.F.R. §51.165(a)(2)(i).**

In a subsequent proposed rule, EPA stated that its divergent approach was justified by the decision of the Court in *Alabama Power II*:

> . . . on December 14, 1979, the United States Court of Appeals for the District of Columbia Circuit issued its final opinion in *Alabama Power Co. v. Costle*, 13 ERC 1993, and ***held that where a source emits in major amounts any pollutant(s) for which the area in which the source would locate is designated nonattainment, Part C [Prevention of Significant Deterioration] review should not apply to those pollutants***.

46 Fed. Reg. 9,124, 9,125 (Jan. 28, 1981) (emphasis added), JA57, 58. EPA subsequently proposed to relocate its rule as part of a comprehensive effort to consolidate its regulations. 48 Fed. Reg. 46,152, 46,166–68 (Oct. 11, 1983), JA59, 60-62. Ultimately, EPA relocated its rule to 40 C.F.R. §51.165(a)(2)(i), where it is located today. Final Rule, 51 Fed. Reg. 40,656, 40,669–72 (Nov. 7, 1986), JA63, 64-67; Final Rule, 67 Fed. Reg. 80,186, 80,245–48 (Dec. 31, 2002), JA84, 87-90.

III. Rule Under Review

EPA's rule creates a distinction between a major source for the Prevention of Significant Deterioration program and a major source for the Nonattainment New Source Review program. The former program applies to a facility that is a "major stationary source," which is one that emits or has the potential to emit 100 tons/year or more of any air pollutant. 40 C.F.R. §52.21(a)(2) ("[t]he requirements of this section apply to the construction of any new major stationary source"); 40 C.F.R. §52.21(b)(1)(i) (defining a "major stationary source" as a specified facility which "emits, or has the potential to emit, 100 [tons/year] or more of any regulated [New Source Review] pollutant").[8] But for the latter program, EPA only considers whether a facility is a "major stationary source" "*for the particular pollutant for*

[8] Although the statute technically creates a Prevention of Significant Deterioration program for a "major emitting facility" and a Nonattainment New Source Review program for a "major stationary source," these two terms are defined synonymously in the statute. 42 U.S.C. §7602(j). Accordingly, EPA uses the term "major stationary source" in its regulations for both programs.

which the region is in nonattainment." 45 Fed. Reg. 31,307, 31,312 (May 13, 1980), as codified at 40 C.F.R. §51.165(a)(2)(i) (emphasis added), JA19, 23. Petitioners challenge this rule.

SUMMARY OF ARGUMENT

Energy Answers plans to construct a solid waste incinerator in a lead nonattainment area in Arecibo, Puerto Rico. Members of petitioning organizations live in the community and are opposed to this plan because of its environmental impacts. According to Energy Answers' documents, the incinerator would release more emissions of lead than the battery recycling facility that caused the lead nonattainment problem in the first place. Allowing the incinerator to be constructed would worsen air quality in this lead nonattainment area.

EPA granted Energy Answers a permit to construct an incinerator under the Prevention of Significant Deterioration program, applicable to attainment areas (Arecibo is in attainment with some of the national ambient air quality standards). In doing so, EPA said the incinerator is not subject to Nonattainment New Source Review, a parallel but more stringent program for addressing air pollution in nonattainment areas. If Nonattainment New Source Review were to apply, Energy Answers would have to obtain offsets against its new lead emissions. Given the limited number of sources emitting lead in this area, and because the incinerator would generate more lead emissions than the battery recycling facility causing the

nonattainment problem, it is the position of Petitioners that Energy Answers could not obtain enough offsets. In other words, the incinerator could not be permitted if it were subject to Nonattainment New Source Review.

EPA concluded that Nonattainment New Source Review does not apply, based on its rule limiting the pollutants whose potential to emit may trigger Nonattainment New Source Review, to only nonattainment pollutants. EPA originally promulgated this rule at 45 Fed. Reg. 31,307, 31,312 (May 13, 1980), and it is now codified at 40 C.F.R. §51.165(a)(2)(i). Petitioners are challenging this rule in this appeal. The Court should vacate this final rule because it violates the Clean Air Act.

Although EPA promulgated its rule 35 years ago, EPA's grant of a permit to Energy Answers makes this challenge to EPA's rule ripe for review. Petitioners have standing because they would be affected by air emissions from the incinerator.

STANDING/RIPENESS AND TIMELINESS

I. Petitioners have standing to challenge EPA's rule.

Petitioners are organizations whose members reside in Arecibo, Puerto Rico. Petitioners are opposed to the construction and operation of an incinerator by Energy Answers in Arecibo because of a number of environmental impacts, including the release of new lead emissions from the incinerator.

Each of the standing declarants has set forth particularized facts demonstrating that the construction of the incinerator affects them personally. Declaration of Luisa Margarita Águila Nieves ¶¶3, 8 (Sept. 24, 2014) (noting her respiratory problems and proximity of her residence to incinerator site); Declaration of Rafael Bey Nazario ¶¶3, 7–8 (Sept. 18, 2014) (noting his respiratory problems and proximity of his residence to incinerator site); Declaration of Wilfredo Vélez ¶¶3, 7–8 (Sept. 24, 2014) (noting his respiratory problems and proximity of his residence to incinerator site); Declaration of Jessica Seiglie Quiñones ¶¶3, 7–8 (Sept. 23, 2014) (noting her respiratory problems, proximity of her residence to incinerator site, and personal involvement in solid waste recycling advocacy organization); Declaration of Javier Biaggi Caballero ¶¶4, 8–11 (Sept. 22, 2014) (noting his respiratory problems, proximity of his residence to incinerator site, and personal involvement as a leader in a local environmental organization).

Petitioners satisfy the Court's requirements for standing, as set forth in *Sierra Club v. EPA*, 292 F.3d 895, 900–01 (D.C. Cir. 2002). D.C. Circuit Rule 28(a)(7). In EPA's motion to dismiss, EPA and Energy Answers made an objection based on ripeness and timeliness.

II. Petitioners' legal challenge to EPA's rule is ripe and timely.

In general, Section 307(b)(1) of the Clean Air Act requires a party to challenge a rule within 60 days of its promulgation, which would have been July 12, 1980 for the final rule challenged here. 42 U.S.C. §7607(b)(1). But there is an exception to this requirement. A party may make a legal challenge after the statutory 60-day period "if such petition is based solely on grounds arising after such sixtieth day." *Id.* In such a case, the petition for review "shall be filed within sixty days after such grounds arise." *Id.*

The grounds for Petitioners' challenge arose on May 19, 2014. On that date, EPA published the notice of the final permit in the Federal Register, for the construction and operation of an incinerator by Energy Answers under the Prevention of Significant Deterioration program. 79 Fed. Reg. 28,710, 28,712 (May 19, 2014) ("review [of this Prevention of Significant Deterioration permit] may be sought only by the filing of a petition for review in the United States Court of Appeals for the appropriate circuit within 60 days from the date on which these determinations are published in the Federal Register"), JA120, 122. The 60-day period started on May 19, 2014, and ended on July 18, 2014. Petitioners timely filed their petition for review on July 17, 2014. Therefore, they may proceed with the appeal.

This conclusion is consistent with the Court's precedent allowing a party to challenge an agency action beyond the limitations period, based on a new, fact-based controversy. The Court has long assured petitioners they will not be foreclosed from their day in court when a challenge to an agency action becomes ripe for them, even beyond the limitations period. *See Balt. Gas & Elec. Co. v. Interstate Commerce Comm'n*, 672 F.2d 146, 148 (D.C. Cir. 1982). In that case, the parties recognized that no imminent harm confronted the company as a result of an interpretive order, but the company filed a legal challenge during the short 60-day limitations period, to be safe. *Id.* at 147–48. In declining to hear the case, the Court assured the company it could make a legal challenge later, once a fact-based controversy arose. *Id.* ("Because review is not available now, [Baltimore Gas & Electric] and other similarly situated shippers will not be barred, if and when a fact-based controversy eventuates, from challenging the Commission's interpretation"). *Accord, Grand Canyon Air Tour Coal. v. Fed. Aviation Admin.*, 154 F.3d 455, 473 (D.C. Cir. 1998) ("'our finding of unripeness gives petitioners the needed assurance' that they will not be foreclosed from judicial review when the appropriate time comes").

The Court recently addressed the exception to the 60-day rule under Section 307(b)(1) of the Clean Air Act and held that "[t]he exception encompasses the occurrence of an event that ripens a claim." *Coal. for Responsible Regulation v.*

EPA, 684 F.3d 102, 129–30 (D.C. Cir. 2012). An injury-in-fact that is certainly impending will make a matter ripe. *Id.* at 130–31. The Court held that business and industry petitioners could challenge EPA rules regarding the applicability of the Prevention of Significant Deterioration program that had been promulgated in 1978, 1980, and 2002, despite the passage of decades. *Id.* at 129–32. Those petitioners were now subject to a permit requirement for their greenhouse gas emissions under the Prevention of Significant Deterioration program because those emissions were now subject to regulation under the mobile source program. *Id.* at 130–31. Consequently, the Court held they had ripe claims that were validly filed within sixty days of the Tailoring Rule. *Id.* at 131–32.

The Court should reach a similar result here. Just as those business petitioners established an injury-in-fact by now being subject to a permit requirement, Petitioners suffered an injury from EPA's rule when EPA granted a permit to Energy Answers to construct and operate an incinerator whose air emissions will adversely affect them. Petitioners' Declarations (attached to statutory addendum).

Petitioners' challenge has ripened because the permit creates a "substantial probability" of injury to them. *Coal. for Responsible Regulation*, 684 F.3d at 131 ("[Petitioners'] challenges ceased to be speculative when EPA promulgated the Tailpipe Rule regulating greenhouse gases and their challenges ripened because of

the 'substantial probability' of injury to them"). According to the statute, the Nonattainment New Source Review program requires Energy Answers to obtain offsets against its lead emissions from other sources of lead emissions in the Arecibo nonattainment area. 42 U.S.C. §§7503(a), (c). It cannot do this because the incinerator will release more lead emissions than the battery recycling facility that caused the lead nonattainment problem. *See* Prevention of Significant Deterioration Permit Application 3-1, 3-4, Table 3-1; Appendix A-Table 2, JA127, 130, 157; EPA Envirofacts Reports, JA222-226, JA354-358. Because EPA's rule exempts the incinerator from Nonattainment New Source Review and its requirements, Petitioners are now injured by that rule.

The Court's precedent allowing for a newly ripened challenge to an agency action is available not only to businesses that are subject to permits, but also to residents who are affected by permits. If a challenge to an EPA rule can ripen when EPA requires a company to obtain a permit, a challenge to an EPA rule can ripen for residents when EPA grants a permit that affects them. *See Coal. for Responsible Regulation*, 684 F.3d at 131.

The Court should reject EPA's suggestion that the 60-day period for review was triggered during the Prevention of Significant Deterioration permit application process, long before EPA even granted that final permit. *See* EPA's Reply in Support of EPA's Motion to Dismiss 5–7 (Oct. 6, 2014). EPA asserts that

Petitioners suffered a "substantial probability" of injury making the case ripe when EPA issued notice of a public comment period on that application. *See id.*, citing Notice dated May 14, 2012, JA165-167; 42 U.S.C. §7475(a)(2) (statutory requirement of a public hearing with opportunity for interested persons to appear and submit presentations relating to the application). EPA is mistaken.

In *Coalition for Responsible Regulation*, business and industry challenged the Tailpipe Rule as a trigger for the regulation of greenhouse gases for stationary sources under EPA rules dating back to the 1970s. *Coal. for Responsible Regulation*, 684 F.3d at 115–16. EPA objected to petitioners' ability to challenge rules promulgated decades earlier:

> EPA maintains that this challenge is untimely because its interpretation of the [Prevention of Significant Deterioration] permitting triggers was set forth in its 1978, 1980, and 2002 Rules.

Id. at 129. In response, petitioners argued that the challenge was timely because they commenced the action within the 60-day period after the promulgation of the final Tailpipe Rule:

> Industry Petitioners thus maintain that because [National Association of Home Builders] and [National Oilseed Processors Association] filed their petitions on July 6, 2010, within 60 days of the promulgation of the Tailpipe Rule in the Federal Register on May 7, 2010, their challenges are timely.

Id. at 131. *See* 75 Fed. Reg. 25,324 (May 7, 2010) (final "Tailpipe Rule"), JA114. It is noteworthy that petitioners would have been time-barred from making challenges to the 1978, 1980, and 2002 rules if the 60-day period had started from the date of the *proposed* Tailpipe Rule. EPA published the proposed Tailpipe Rule in September 2009, nine months before petitioners commenced that litigation. 74 Fed. Reg. 49,454 (Sept. 28, 2009), JA113. The Court rejected EPA's claim that the challenge was untimely and allowed petitioners to present their challenge. *Coal. for Responsible Regulation*, 684 F.3d at 131–32.

The Court should do the same here. In the present case, EPA's notice of public comment dated May 14, 2012 is equivalent to EPA's proposed Tailpipe Rule. Because neither action was a final agency action, neither action was sufficient to trigger the 60-day time period for challenging rules from 1980. If EPA is suggesting that a simple notice of public comment period can trigger the 60-day time period, such a change in the law would increase litigation by forcing petitioners to bring pre-emptive legal actions, just to be safe. This is the very circumstance that led to the development of the Court's doctrine allowing litigants to bring legal challenges to agency rules only when they become ripe to them. *Balt. Gas & Elec. Co.*, 672 F.2d at 147–48 (counsel for the company brought the legal challenge early because the rule "might be read to command a petition to contest the Commission's interpretation now or never").

The issue in this case is the validity of an EPA rule limiting the air pollutants whose potential to emit may trigger Nonattainment New Source Review. Petitioners' legal challenge became ripe when EPA granted Energy Answers a permit to construct and operate an incinerator. The problem with the EPA rule in the specific context of the Arecibo nonattainment area did not come to light until recently. In this unique case, it is important that lead is the only air pollutant for which part of Arecibo is in nonattainment, and that lead tends to be emitted in amounts much less than the 100 tons/year threshold for a "major emitting facility" or "major stationary source."

ARGUMENT

I. Standard of Review

The Court reviews challenges to EPA's final rules under the Clean Air Act to determine whether they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 42 U.S.C. §7607(d)(9)(A). Challenges to EPA's interpretations of the Clean Air Act itself are governed by the two-pronged test of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *New Jersey v. EPA*, 517 F.3d 574, 581 (D.C. Cir. 2008).

Under Step One, the court asks "whether Congress has directly spoken to the issue." *Id.*, quoting *Chevron*, 467 U.S. at 842. If the intent of Congress is clear, "that is the end of the matter, for the court, as well as the agency, must give effect

to the unambiguously expressed intent of Congress." *Id.*, quoting *Chevron*, 467 U.S. at 842–43. "[T]o avoid a literal interpretation at *Chevron* Step One, [EPA] must show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it." *Id.* at 582, quoting *Engine Mfrs. Ass'n v. EPA,* 88 F.3d 1075, 1089 (D.C. Cir. 1996).

Only if the Court determines that "Congress has not directly addressed the precise question at issue," then under Step Two "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 581, quoting *Chevron*, 467 U.S. at 843.

II. The Court has Jurisdiction because Petitioners are Challenging an EPA Rule of National Applicability.

In their petition for review, Petitioners made it clear they are challenging an EPA rule of national applicability:

> This petition seeks judicial review of the nationally applicable final rule of the Environmental Protection Agency entitled *Requirements for Preparation, Adoption, and Submittal of SIPs; Approval and Promulgation of State Implementation Plans*, 45 Fed. Reg. 31,307, 31,312 (May 13, 1980) (to be codified at 40 C.F.R. §51.18(j)), attached as Exhibit 2. This rule is now codified at 40 C.F.R. §51.165(a)(2)(i).

Petition for Review 2 (July 16, 2014). For legal challenges to rules of national applicability, the first sentence of Section 307(b)(1) of the Clean Air Act makes the present Court the exclusive forum for judicial review:

> (b) Judicial review
>
> **(1)** ***A petition for review of*** action of the Administrator in promulgating any national primary or secondary ambient air quality standard, ... or ***any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter*** [the Clean Air Act] ***may be filed only in the United States Court of Appeals for the District of Columbia***.

42 U.S.C. §7607(b)(1) (emphasis added).

It is axiomatic that challenges to EPA rules under the Clean Air Act are made in the present Court. *See, e.g.*, *White Stallion Energy Ctr. v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014) (challenge by business and industry to EPA rule for hazardous air pollutants from the utility industry), *certiorari granted in part*, *Nat'l Mining Ass'n v. EPA*, __ U.S. __, 135 S.Ct. 703; *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2013) (challenge by business and industry to EPA rule for interstate transport of air pollutants), *reversed and remanded on other grounds*, __ U.S. __, 134 S.Ct. 1584; *Coal. for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) (challenge by business and industry to EPA rules for greenhouse gases in the Prevention of Significant Deterioration program), *affirmed in part, reversed in part on other grounds*, *Utility Air Regulatory Grp. v.*

EPA, __ U.S. __, 134 S.Ct. 2427. Accordingly, if Petitioners had filed this appeal in another Circuit Court of Appeals, EPA would have made a motion to dismiss on the grounds that the appeal belongs before the present Court.

The Court should reject EPA's assertion that this is only a local matter that belongs in the Circuit Court of Appeals having jurisdiction over Puerto Rico. While the motivation for this appeal was EPA's granting of a permit to construct an incinerator to Energy Answers under the Prevention of Significant Deterioration program, Petitioners have made it clear that they are challenging the final rule at 45 Fed. Reg. 31,307, 31,312, as codified at 40 C.F.R. §51.165(a)(2)(i). Petition for Review (July 16, 2014); Statement of Issues (Aug. 19, 2014). With respect to the decision of the Environmental Appeals Board, this appeal is addressed to its reasoning that Nonattainment New Source Review does not apply to this incinerator, based on EPA's rule. Board Opinion 22–28, JA265-271.

III. Petitioners Present Compelling Facts in Support of this Challenge to EPA's Rule.

Before addressing the two-part *Chevron* test applicable to this legal challenge, Petitioners will explain why this unusual case has arisen, and why it matters to public health and the integrity of the Clean Air Act.

A. EPA's rule allows an incinerator to circumvent new source review for lead emissions in a lead nonattainment area.

In the present case, the practical effect of EPA's rule is to exempt lead emissions from new source review entirely, whether under the Prevention of Significant Deterioration program or the Nonattainment New Source Review program. On the one hand, EPA asserts that Prevention of Significant Deterioration review does not apply to nonattainment pollutants. EPA's Responses to Public Comments 58 (¶3), 75 (¶1), 99 (¶¶4, 5), 107–08 (comment 2) (June 2013), JA205, 206, 207, 208-209. On the other hand, EPA asserts that the Energy Answers incinerator is not subject to Nonattainment New Source Review, based on its rule limiting the pollutants whose potential to emit may trigger this program, to only nonattainment pollutants. *Id.* at 99 (¶5), 107–08 (¶1), JA207, 208-209. EPA's rule creates a loophole that allows an incinerator to circumvent new source review for lead emissions in a lead nonattainment area.

B. Unlike other criteria pollutants, lead is persistent, bioaccumulative, and toxic.

The nature of lead emissions in general and the specific problem in this lead nonattainment area demonstrate why Congress was correct in requiring Nonattainment New Source Review to be triggered by the potential to emit for any air pollutant, and not just for a nonattainment pollutant. The incinerator's potential to emit lead is approximately 0.31 tons/year, or 630 pounds/year. *See* Prevention

of Significant Deterioration Permit Application Section 3.1.1, 3-1, 3-4, Table 3-1 (Feb. 2011), JA127, 130; Appendix A-Table 2, JA157. That number might appear low compared to the "major stationary source" threshold of 100 tons/year. But it would be wrong to dismiss this as something that does not matter. It matters a great deal.

Lead is different from other criteria pollutants. Although it tends to be released at lower concentrations and amounts by a limited number of stationary sources (e.g., incinerators and lead smelters), it is a toxic chemical that harms human health at low concentrations and amounts. In fact, EPA has designated lead and lead compounds as Persistent, Bioaccumulative, and Toxic chemicals, subjecting them to a more stringent threshold for chemical reporting under the Toxic Release Inventory program of the Emergency Planning and Community Right-to-Know Act of 1986. 66 Fed. Reg. 4,500, 4,547 (Jan. 17, 2001) (adding lead to 40 C.F.R. §372.28, "Lower thresholds for chemicals of special concern"), JA81, 83.

Under that rule, a facility must file a Toxic Release Inventory report if it manufactures, processes, or otherwise uses lead in amounts greater than 100 pounds per year. *Id.* In contrast, the default reporting thresholds are 25,000 pounds per year for toxic chemicals that are manufactured or processed, and 10,000 pounds per year for toxic chemicals that are otherwise used. 40 C.F.R.

§372.25(a), (b). The threshold is much lower for lead because it is toxic at low concentrations and amounts. 66 Fed. Reg. 4,504 ("[t]he nature of [Persistent, Bioaccumulative, and Toxic] chemicals, including lead and lead compounds, indicates that small quantities of such chemicals are of concern, which provides strong support for setting lower reporting thresholds than the current section 313 thresholds of 10,000 and 25,000 pounds"), JA82. Even among other toxic chemicals, lead is very bad.

As a Persistent, Bioaccumulative, and Toxic chemical, lead is like mercury. 64 Fed. Reg. 58,666, 58,671–72 (Oct. 29, 1999) (identifying mercury and mercury compounds as Persistent, Bioaccumulative, and Toxic chemicals, and setting reporting thresholds of 10 pounds per year), JA78, 79-80. Mercury is a hazardous air pollutant under Section 112 of the Clean Air Act. 42 U.S.C. §7412(b)(1). In fact, *lead compounds* were added to the list of hazardous air pollutants in the 1990 Amendments. *Id.*, Pub. L. 101-549, 104 Stat. 2399, 2537. As a result, EPA has promulgated Section 112 standards for lead acid battery manufacturers (Subpart PPPPPP, 40 C.F.R. §63.11421), secondary lead smelters (Subpart X, 40 C.F.R. §63.541), and primary lead smelters (Subpart TTT, 40 C.F.R. §63.1541). Because a secondary lead smelter is responsible for the lead nonattainment problem in Arecibo, it is clear we are dealing with a particularly harmful air pollution problem.

C. Considering its toxic nature, the listing of lead as a criteria pollutant was an historical anomaly.

It is only for historical reasons that *elemental lead* was listed as a criteria pollutant under Section 108, as opposed to a hazardous air pollutant under Section 112. EPA did this in response to litigation in the 1970s. *Natural Res. Def. Council v. Train*, 411 F.Supp. 864, 871 (S.D.N.Y. 1976), *aff'd*, 545 F.2d 320, 328 (2nd Cir. 1976). The court ordered EPA to list lead as a criteria pollutant because lead emissions resulted from "numerous or diverse sources," including automobiles burning leaded gasoline. *See Train*, 411 F.Supp. at 867; 545 F.2d at 324; 42 U.S.C. §7408(a)(1)(B). Because it was already regulated as a criteria pollutant, Congress barred EPA from regulating it as a hazardous air pollutant, in the 1990 Amendments. Pub. L. 101-549, 104 Stat. 2399, 2537; 42 U.S.C. §7412(b)(7) ("The Administrator may not list elemental lead as a hazardous air pollutant under this subsection"). But preserving it as a criteria pollutant does not mean that lead is any less toxic to human health.

D. The very low national ambient air quality standard for lead demonstrates it is more harmful than other criteria pollutants.

The actual numerical level of the national ambient air quality standard for lead demonstrates it is harmful at very low concentrations and amounts. The current standard is 0.15 micrograms per cubic meter, measured over a three-month period. 73 Fed. Reg. 66,964, 67,052 (Nov. 12, 2008), JA109,112; 40 C.F.R §50.16.

This is the most stringent of all the numerical levels in the national ambient air quality standards. *See* 40 C.F.R §§50.1–50.18. By comparison, fine particulates are the criteria pollutants most similar to lead. EPA has set its standards at numerical levels approximately 100 times greater than the lead standard of 0.15 micrograms per cubic meter. *See* 40 C.F.R §50.18(a) (annual standard of 12.0 micrograms per cubic meter and 24-hour standard of 35 micrograms per cubic meter). The reason for the difference is clear. In addition to presenting respiratory hazards common to particulates, lead is toxic. 73 Fed. Reg. 66,990 (recognizing "evidence of all particle sizes of Pb [lead] contributing to blood Pb [lead] and health effects by both ingestion and inhalation pathways"), JA111.

E. In setting the low national ambient air quality standard for lead, EPA was concerned especially about children, a particularly sensitive subgroup.

In 1978, EPA set the lead standard at 1.5 micrograms per cubic meter. 43 Fed. Reg. 46,246, 46,258 (Oct. 5, 1978), JA37, 38; 40 C.F.R §50.12. EPA was concerned especially about blood levels in children, a particularly sensitive population subgroup:

> In establishing the level of the final standard. ***EPA has determined that young children (age 1–5 years) should be regarded as a group within the general population that is particularly sensitive to lead exposure***. The final standard for lead in air is based on preventing most children in the United States from exceeding a blood lead level of 30 micrograms lead per deciliter of blood . . . .

43 Fed. Reg. 46,246, column 1 (emphasis added), JA37.

But in 2008, EPA made the standard more stringent, dramatically lowering it to 0.15 micrograms per cubic meter, or one-tenth of the original standard. 73 Fed. Reg. 66,964, 67,052, JA109, 112. This was a response to a large body of updated scientific evidence on the adverse public health impacts of lead. *Id.* at 66,987, column 1, JA110. This evidence included the neurological, hematological, and immune effects for children, as well as the hematological, cardiovascular, and renal effects for adults. *Id.* EPA made a finding that "air-related Pb [lead] exposure pathways contribute to blood Pb [lead] levels in young children, by inhalation and ingestion." *Id.*, column 2. Although blood levels in children had fallen significantly since 1978, EPA actually saw a greater incremental impact associated with exposure to lead at lower blood levels:

> Further, the Administrator notes the ***current evidence that suggests a steeper dose-response relationship at these lower blood Pb [lead] levels than at higher blood Pb [lead] levels***, indicating the potential for greater incremental impact associated with exposure at these lower levels.

Id., column 2. (emphasis added). Given the revised scientific evidence, EPA concluded that the standard should be reduced substantially, to protect children and adults:

> Further, the Administrator believes that ***the current evidence indicates the need for a standard level that is substantially lower than the current level*** to provide

> increased public health protection, ***especially for at-risk groups, including most notably children***, against an array of effects, ***most importantly including effects on the developing nervous system***.

Id., column 2. (emphasis added). Consequently, EPA recognizes that lead is a toxic chemical that is harmful to public health, even at low concentrations and amounts.

F. Existing concentrations of lead in the air in Arecibo are not protective of public health, even with past emissions levels of approximately 1 ton/year.

EPA's designation of a lead nonattainment area around a battery recycling facility in Arecibo demonstrates that lead emissions already present a danger to public health. 76 Fed. Reg. 72,097, 72,098, 72,119 (designating the "[a]rea bounded by 4 km from the boundaries of the Battery Recycling Company facility" as a nonattainment area), JA117, 118, 119; 40 C.F.R. §81.355. The primary national ambient air quality standards are set at levels which "allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. §7409(b)(1). Because the air quality does not attain this standard, existing concentrations of lead in the air are not protective of public health.

The nonattainment problem was caused by a battery recycling facility, which is a secondary lead smelter. Letter from EPA Region 2 to Governor of Puerto Rico (June 14, 2011), Technical Support Document 7, JA220 ("[t]he Battery Recycling Company facility is the largest emissions source located upwind of the

violating monitor, and EPA believes this facility caused and/or contributed to the violating monitor during the period"). But the battery recycling facility's emissions during the years 2007–2013 were actually *less than 1 ton/year* and actually *less* than those contemplated by Energy Answers. EPA Envirofacts Reports, JA222-226, JA354-358. Therefore, this lead nonattainment problem demonstrates that very low concentrations and amounts of lead present harm to human health.

G. Energy Answers may not construct the incinerator because it cannot obtain the offsets of lead emissions required by the Nonattainment New Source Review program.

Under Section 173, a new "major stationary source" in a nonattainment area must obtain offsets against increased emissions of air pollutants. 42 U.S.C. §§7503(a)(1)(A), 7503(c). Here, it is not possible for Energy Answers to obtain the required offsets because it would emit *more emissions* than the battery recycling facility. Applying the clear statutory language, it may not construct and operate its incinerator in this lead nonattainment area.

IV. Applying Step One of *Chevron*, EPA's Rule Unlawfully Limits the Pollutants Whose Potential to Emit May Trigger Nonattainment New Source Review, to Nonattainment Pollutants.

A. Under its decision in *New Jersey v. EPA*, the Court should vacate EPA's rule for violating the plain language of the statute.

The Court should follow the result in *New Jersey v. EPA*. A panel of the Court unanimously held that EPA's attempt to de-list mercury from the list of

Section 112 hazardous air pollutants violated the statute, requiring the vacating of both the Delisting Rule and the Section 111 Clean Air Mercury Rule. *New Jersey v. EPA*, 517 F.3d at 577, 583. The Court decided that case at Step One. *Id.* at 582 ("EPA's purported removal of [electric utility steam generating units] from the section 112(c)(1) list therefore violated the Clean Air Act's plain text and must be rejected under step one of *Chevron*"). The Court rejected EPA's efforts to proceed to Step Two. *Id.* ("EPA offers several arguments in an attempt to evade section 112(c)(9)'s plain text, but they are not persuasive").

The Court has vacated other EPA rules at Step One for writing language out of a statute. It vacated Section 112 emission standards for brick and ceramics kilns, which EPA erroneously based on the technology that was "achieved" rather than on the "maximum achievable control technology" required by the statute:

> ***EPA cannot circumvent* Cement Kiln*'s holding*** that section 7412(d)(3) requires floors based on the emission level actually achieved by the best performers (those with the lowest emission levels), not the emission level achievable by all sources, ***simply by redefining "best performing" to mean those sources with emission levels achievable by all sources***.

Sierra Club v. EPA, 479 F.3d 875, 880 (D.C. Cir. 2007) (emphasis added). *Id. at* 876, 880–81.

In another case, the Court vacated the Equipment Replacement Provision, in violation of the statutory requirement of a permit for "any physical change" that

increases emissions. *New York v. EPA*, 443 F.3d 880, 883, 890 (D.C. Cir. 2006) ("Congress defined 'modification' in terms of emission increases, but the [Equipment Replacement Provision] would allow equipment replacements resulting in non-*de minimis* emission increases to avoid [New Source Review]"). The Court also vacated EPA approvals of Total Maximum Daily Loads that limited pollution only on an annual or seasonal basis, rather than on a daily basis. *Friends of the Earth v. EPA*, 446 F.3d 140, 144 (D.C. Cir. 2006) ("[n]othing in this language even hints at the possibility that EPA can approve total maximum 'seasonal' or 'annual' loads. The law says 'daily.'"). *Id.* at 148. Accordingly, "achievable" means "achievable," not "achieved." "Any physical change" means "any physical change." "Daily" means "daily," not "seasonal" or "annual." In the present case, "major stationary source" means "major stationary source."

In addition, the Court has "consistently struck down administrative narrowing of clear statutory mandates." *Sierra Club v. EPA*, 129 F.3d 137, 140 (D.C. Cir. 1997). In that case, the Court held unlawful an EPA regulation providing for a twelve-month grace period during which activities in nonattainment areas would be exempt from transportation conformity requirements:

> We hold that the challenged grace period is contrary to the plain meaning of the Clean Air Act. ***The Clean Air Act categorically mandates that the transportation***

> ***conformity requirements shall apply to nonattainment and maintenance areas***.

Id. at 138 (emphasis added). The Court reasoned that "the Act does not authorize the EPA to limit the applicability of the conformity requirements by exempting some nonattainment areas, even for a limited period of time." *Id.* at 142. In accordance with that holding, the Court vacated an EPA rule attempting to revoke the 1997 ozone national ambient air quality standard, for purposes of the transportation conformity requirements:

> . . . ***[the statute] mandates application of the conformity requirements, without exception, for "a nonattainment area"*** and for a former nonattainment area "redesignated" as "an attainment area" and "required to develop a maintenance plan."

Natural Res. Def. Council v. EPA, 777 F.3d 456, 470–71 (D.C. Cir. 2014) (emphasis added). *Id. at* 473. Applying these cases, the statute does not allow EPA to limit the pollutants whose potential to emit may trigger Nonattainment New Source Review, to nonattainment pollutants.

A "major stationary source" in a nonattainment area triggers Nonattainment New Source Review if it has a potential to emit of 100 tons/year or more of "any air pollutant," whether or not it is a nonattainment pollutant. 42 U.S.C. §7602(j) ("'major stationary source' and 'major emitting facility' mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant"). Sections 172 and 173

require a permitting program for "major stationary sources" in nonattainment areas. 42 U.S.C. §§7502 (program requirements), 7503 (permit requirements). The statutory language is clear. The trigger is the potential to emit of 100 tons/year or more of "any air pollutant." It does not matter whether the region is in nonattainment for that air pollutant.

The incinerator's potential to emit for at least five pollutants other than lead (carbon monoxide, nitrogen oxides, sulfur dioxide, hydrogen chloride, and coarse particulates) makes it both a "major emitting facility" for Prevention of Significant Deterioration review and a "major stationary source" for Nonattainment New Source Review. The actual amount of lead emitted by the incinerator and its potential to emit for lead do not change this result. Because the incinerator is a "major emitting facility" that triggers Prevention of Significant Deterioration review, it necessarily is a "major stationary source" that triggers Nonattainment New Source Review.

B. The legislative history of the Clean Air Act Amendments of 1977 demonstrates a congressional intent to require preconstruction permits for all "major stationary sources," whether locating in attainment areas or nonattainment areas.

The Supreme Court held that the Clean Air Act does not allow EPA to consider costs in developing a national ambient air quality standard because the text of Section 109 does not mention costs, while other sections of the statute refer to costs. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 464–71 (2001); *Am.*

Trucking Ass'ns v. EPA, 175 F.3d 1027, 1040–41 (D.C. Cir. 1999); *Accord, Russello v. U.S.*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). Applying these principles to the present case, Congress did not intend to limit the scope of Nonattainment New Source Review in the manner that EPA has done.

Four days before the passage of the 1977 Amendments, the House Report stated that "preconstruction permits are required by the act for all new or modified major stationary sources, whether locating in significant deterioration or nonattainment areas." H.R. Rep. No. 95-564 (1977) (Conference Report), 1977 U.S.C.C.A.N. 1502, 1508, JA348, 350. While Congress defined "major stationary source" and "major emitting facility" synonymously, it modified the definition of "major emitting facility" for the Prevention of Significant Deterioration program. *Id.* at 1553. In contrast, Congress did not modify the general definition of "major stationary source" for the Nonattainment New Source Review program. By modifying the definition for the former program, but not for the latter program, Congress did not intend to limit the applicability of the Nonattainment New Source Review program. EPA's rule is inconsistent with the intent of Congress.

C. Because the statutory definition of "major stationary source" is based on the potential to emit for "any air pollutant," the Court should vacate EPA's rule limiting it to nonattainment pollutants.

EPA has unlawfully created an exemption from the statutory definition of "major stationary source" for an incinerator whose potential to emit for a nonattainment pollutant is less than 100 tons/year, even though it has a potential to emit of 100 tons/year or more for a number of other pollutants. In the statutory definition of "major stationary source," the phrase "any air pollutant" means "any air pollutant," rather than "any nonattainment pollutant." *See Massachusetts v. EPA*, 549 U.S. 497, 528–32 (2007) (phrase "any air pollutant" is sufficiently broad to extend to greenhouse gases). The term "air pollutant" applies to "all airborne compounds of whatever stripe." *Id.* at 528–29 ("the definition embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word 'any'").

Although the Supreme Court has since limited the applicability of new source review to greenhouse gases, that case involved a unique set of facts that does not apply here. *See Utility Air Regulatory Grp. v. EPA*, __ U.S. __, 134 S.Ct. 2427 (2014). The Court held that for purposes of triggering the Prevention of Significant Deterioration program, the statute-wide definition of "air pollutant" does not apply to greenhouse gases, only because a contrary result would radically transform that program. *Id.*, __ U.S. __, 134 S.Ct. at 2442–43. That holding is

limited to the facts of that case, namely, the tremendous volume of greenhouse gases and the transformation of that program that would result from using them as a trigger for review.

There is a world of difference between *Utility Air Regulatory Group* and the present appeal. The present appeal involves lead, which is emitted by discrete industrial sectors (e.g., incinerators and secondary lead smelters) at relatively low concentrations and amounts. This case presents the *opposite* situation of greenhouse gases, which are universal pollutants. The concerns for avoiding absurd results in that case do not apply here.

D. The Court should follow *Alabama Power Company v. Costle*, which vacated an EPA rule limiting the applicability of technology requirements to only those pollutants whose potential to emit triggered Prevention of Significant Deterioration review.

When EPA was conducting rulemakings for nonattainment areas, it was also conducting rulemakings for attainment areas. *See* 43 Fed. Reg. 26,380 (June 19, 1978) (promulgating Prevention of Significant Deterioration rules), JA33. A challenge to those rules led to two decisions in *Alabama Power Company v. Costle*. In both decisions, the Court vacated an EPA rule that limited the applicability of technology requirements to only those pollutants whose potential to emit triggered Prevention of Significant Deterioration review. The Court did this because the exemption violated the statute. The Court should follow those decisions and vacate EPA's rule.

In *Alabama Power,* the Court addressed a statutory requirement that a new "major emitting facility" (an unspecified source with a potential to emit of 250 tons/year) install the Best Available Control Technology for each pollutant subject to regulation under the Clean Air Act. *Alabama Power I,* 606 F.2d at 1086. *See* 42 U.S.C. §7475(a)(4). While acknowledging that "potential emissions of 250 [tons/year] of a given pollutant" trigger Prevention of Significant Deterioration review, EPA agreed with commenters that "[Best Available Control Technology] should be required only for those pollutants for which the potential emissions exceed 250 tons." Final Rule, 43 Fed. Reg. 26,380, 26,381–82 (June 19, 1978), JA33, 34-35. Accordingly, it limited the facilities subject to the Best Available Control Technology requirement, consistent with that interpretation:

> (i) Review of major stationary sources and major modifications – ***Source applicability and general exemptions***. (1) The plan shall provide that no major stationary source or major modification shall be constructed unless, as a minimum, requirements equivalent to those contained in the subparagraphs of paragraphs (j), (l), (n), (p), and (r) of this section, have been met. ***The plan may provide that such requirements shall apply to a proposed source or modification only with respect to those pollutants for which the proposed construction would be a major stationary source or major modification***.

Id. at 26,385 (emphasis added), JA36. In other words, EPA determined that Best Available Control Technology should only be required for those pollutants whose potential to emit made the facility a "major emitting facility" in the first

place. *See id.* Essentially, EPA created a regulatory exemption from the statutory requirement that a "major emitting facility" comply with the Best Available Control Technology requirement.

In its first decision in June 1979, the Court vacated EPA's exemption. *Alabama Power I,* 606 F.2d at 1086. The Court recognized an "unambiguous statutory command" that required the installation of Best Available Control Technology "for each pollutant subject to regulation under this Act . . . ." *Id.* Similarly, in the present appeal there is an unambiguous statutory command that a "major stationary source" comply with the requirements of Nonattainment New Source Review—including the requirements for offsets—if it has the potential to emit 100 tons/year or more of "any air pollutant." 42 U.S.C. §§7502(c)(5), 7503(a)(1)(A), (c), 7602(j). The Court should follow *Alabama Power I* and vacate EPA's rule.

In its second decision in December 1979, the Court reaffirmed its holding and provided additional reasoning. It characterized EPA's rule as creating an exemption:

> This provision ***exempts from [Prevention of Significant Deterioration] all pollutants not emitted in quantities of at least 100 tons per year by a major emitting facility of one of the twenty-eight types specified*** in the first sentence of section 169(1), and 250 tons per year by all other sources.

Alabama Power II, 636 F.2d at 404–05 (emphasis added). The Court stated that "[w]e find the regulation to be contrary to the clear statutory language." *Id.* at 405. It reasoned that the Clean Air Act does not exempt pollutants emitted at quantities less than 100 tons/year (for specified sources) or 250 tons/year (for unspecified sources). *Id.* Because there was no statutory basis for this exemption, this was a "clear error of interpretation by EPA." *Id.*

The same reasoning should apply in the present appeal, *a fortiori*. Just as EPA could not limit the pollutants subject to Best Available Control Technology to those triggering Prevention of Significant Deterioration review in the first place, it may not limit the pollutants whose potential to emit may trigger Nonattainment New Source Review to those that caused nonattainment in the first place. In *Alabama Power*, the result of EPA's exemption would have been that some (but not all) pollutants would avoid the Best Available Control Technology requirement. But in the present appeal, the result of EPA's exemption would be that a "major stationary source" would avoid Nonattainment New Source Review altogether, including the requirement to obtain offsets against new emissions. *See* 42 U.S.C. §§7502(c)(5), 7503(a)(1)(A), (c), 7602(j).

With its unlawful rule, EPA has done what was rejected in the *Alabama Power* decisions. The similarity in the language of the rules is remarkable. In *Alabama Power*, the rule provided that "[t]he plan may provide that such

requirements shall apply to a proposed source or modification only with respect to those *pollutants for which the proposed construction would be a major stationary source or major modification*." 43 Fed. Reg. 26,385 (emphasis added), JA36. In the present case, EPA's rule provides that "[s]uch a program shall apply to any new major stationary source or major modification that is *major for the pollutant for which the area is designated nonattainment . . . .*" *Id.* at 31,312 (emphasis added), JA23; 40 C.F.R. §51.165(a)(2)(i). In both cases, EPA's rule tied the applicability of new requirements to the pollutants causing the facility to be a major stationary source. In both cases, this is contrary to the "clear statutory language." The Court should vacate the rule under Step One. EPA is not entitled to any deference.

V. Applying Step Two of *Chevron*, EPA's Rule Unreasonably Limits the Pollutants Whose Potential to Emit May Trigger Nonattainment New Source Review, to Nonattainment Pollutants.

Even if the Court finds that EPA's rule is valid under Step One, the Court should still vacate it because it is unreasonable or "arbitrary and capricious" under Step Two.

A. EPA's rule is unreasonable because it renders the statutory definition of "major stationary source" and the Nonattainment New Source Review program inoperative.

In addition to holding that EPA may not consider costs in setting a national ambient air quality standard under Step One, the Supreme Court rejected EPA's

effort to extend ozone nonattainment deadlines under Step Two. *Whitman*, 531 U.S. at 476–86 (Part IV). Following the revision of the ozone standard in 1997, the issue was whether to apply the general provisions of Subpart 1 (which granted discretion to EPA to extend nonattainment deadlines) or the more specific provisions of Subpart 2 (which limited the discretion of EPA through a statutory table of nonattainment deadlines). *Id.* The Court found ambiguity because of the competing Subparts and proceeded to Step Two.

But the Supreme Court did not defer to EPA's choice of Subpart 1 because it rendered Subpart 2 "utterly inoperative," making the choice unreasonable:

> ***To use a few apparent gaps in Subpart 2 to render its textually explicit applicability to nonattainment areas under the new standard utterly inoperative is to go over the edge of reasonable interpretation***. The EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion.

Id. at 485 (emphasis added). *Id.* at 484–86. In the present case, EPA's rule renders inoperative the significance of being a "major stationary source" in a nonattainment area, as well as the construction moratorium imposed by Congress through the Nonattainment New Source Review program. It too is unreasonable.

Moreover, it is unreasonable, arbitrary, and capricious for EPA to inconsistently require compliance with statutory requirements of the Clean Air Act. *Envtl. Def., Inc. v. EPA*, 509 F.3d 553, 560–61 (D.C. Cir. 2007) (rejecting EPA

interpretation of statute in its rule regulating "hot spot" analyses for transportation conformity determinations under the statutory nonattainment provisions). Under Section 176(c)(1), a federal agency must provide an "assurance of conformity" with a state implementation plan for activities supported by the agency. 42 U.S.C. §7506(c)(1). As part of this showing, the statute requires three things: (1) activities will not cause or contribute to a new violation of any standard "in any area," (2) activities will not increase the frequency or severity of any existing violation of any standard "in any area," and (3) activities will not delay attainment of any standard "in any area." 42 U.S.C. §7506(c)(1)(B)(i), (ii), (iii). But EPA promulgated a rule that only included the first two requirements and not the third. *Envtl. Def.*, 509 F.3d at 560; 40 C.F.R. §93.101 (definition of "cause or contribute to a new violation for a project"). The Court held this was arbitrary and capricious:

> The fundamental problem, however, is that if, as EPA posits in the Final Rule, "any area" in (B)(i) and (B)(ii) properly means "a local area" under either Chevron step one or step two, ***then it is arbitrary and capricious not to define the term similarly in (B)(iii) or not to provide an explanation that satisfactorily addresses the purpose and function of the condition***. EPA's explanation, that individual projects are not required to reduce emissions, does not address this inconsistency. A remand is therefore required for EPA either to interpret (B)(iii) in harmony with (B)(i) and (B)(ii) or to explain why it need not do so.

Envtl. Def., 509 F.3d at 561. Similarly, it is also arbitrary and capricious for EPA to require a "major stationary source" to go through Prevention of Significant Deterioration review, but not Nonattainment New Source Review.

Although the Court's general policy is to remand an unreasonable rule to an agency, in the present case the Court should vacate the rule because EPA cannot salvage its rule from unreasonableness:

> ***When this court remands a rule to an agency for further consideration with little or no prospect of the rule's being readopted upon the basis of a more adequate explanation of the agency's reasoning, the practice of the court is ordinarily to vacate the rule***. *See Allied-Signal, Inc. v. USNRC*, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (court takes account of "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed") . . . [citing cases] . . . .

Ill. Pub. Telecomms. Ass'n v. Fed. Commc'n Comm'n, 123 F.3d 693 (D.C. Cir. 1997) (emphasis added) (vacating portions of agency's rules).

In the present case, the seriousness of the deficiencies in EPA's rule outweighs any potential disruptive consequences of a change. It circumvents the statutory moratorium, as well as the statutory requirement to obtain a permit and offsets under the Nonattainment New Source Review program. This allows for the worsening of air quality in a lead nonattainment area in Arecibo, Puerto Rico, for a chemical that is persistent, bioaccumulative, and toxic, and that causes nervous

system damage in children and adults. *See* Part III, *supra.* Therefore, the Court should vacate EPA's rule.

B. EPA's rule is unreasonable because it blurs the distinction between the concept of a "major stationary source" and the concept of a pollutant.

Although it initially followed the statutory definition of "major stationary source" in the 1977 Amendments, within two years EPA attempted to limit the pollutants whose potential to emit may trigger Nonattainment New Source Review. *See* 44 Fed. Reg. 38,471 (July 2, 1979) (Interpretive Rule), JA43. In that rule, EPA stated that only facilities emitting nonattainment pollutants were subject to restrictions on a "major stationary source" in a nonattainment area. *Id.* at 38,473 (construction moratorium and permit requirement applies "if the emissions from such facility will cause or contribute to concentrations of any pollutant for which a national ambient air quality standard is exceeded in such area"), JA44. This amendment is not necessarily inconsistent with Petitioners' position. That restriction applied to any facilities emitting pollutants "for which the nonattainment area was designated as nonattainment." *Id.* It was not limited to facilities emitting nonattainment pollutants in "major amounts."

But EPA took it a step further. In the preamble, EPA asserted that the restriction applied "only to major sources of the pollutant for which the area was designated as nonattainment of Part D." *Id.* at 38,473, column 1, JA44. This

assertion would not necessarily be inconsistent with Petitioner's position if it merely meant that the restriction applied to any major source emitting a nonattainment pollutant. But EPA completed the transformation of its unreasonable interpretation in a preamble to a subsequent proposed rule for the Prevention of Significant Deterioration program. 44 Fed. Reg. 51,924, 51,941 (Sept. 5, 1979) ("Nonattainment review applicability again requires that the nonattainment pollutant be potentially emitted in major amounts"), JA45, 48. By then, EPA's interpretation was clear and unreasonable.

C. EPA's justification for its rule—"the need for simplicity"—is not a reasonable justification in this case.

After *Alabama Power II*, EPA published its final rule limiting the pollutants whose potential to emit may trigger Nonattainment New Source Review, to only nonattainment pollutants. 45 Fed. Reg. 31,307, 31,312, JA19, 23. EPA buried its reasoning in a footnote, devoid of any meaningful analysis. It summarily based its rationale on the need for "simplicity" in referring to sources located in an air quality control region that may be in attainment for some pollutants but nonattainment for others:

> [fn]3 A source may emit many different pollutants. Also, an area may be designated attainment for certain criteria pollutants and nonattainment for other criteria pollutants. ***For simplicity***, in this notice, ***EPA will use "sources locating in a nonattainment area" to refer to sources locating in an area designated nonattainment for a pollutant for which the source is major***.

Id. at fn. 3.

The Court should reject the justification of "simplicity," just as it has rejected the justification of "administrative convenience" in the past. *Ill. Pub. Telecomms. Ass'n*, 123 F.3d 693–94 (vacating portions of agency's rules); *Ill. Pub. Telecomms. Ass'n v. Fed. Commc'n Comm'n,* 117 F.3d 555, 565 (1997) ("we also find that the [Federal Communications Commission] acted arbitrarily and capriciously in requiring payments only from large [interexchange carriers]—those with over $100 million in toll revenues—for the first phase of the interim plan. The [Federal Communications Commission] based this decision on concerns of administrative convenience"). Here, EPA cannot explain why an incinerator in a nonattainment area should be exempt from Nonattainment New Source Review solely because its potential to emit for lead is less than 100 tons/year, when it has five other air pollutants whose potential to emit is greater than the "major stationary source" threshold of 100 tons/year.

D. To justify its rule, EPA unreasonably mischaracterized the Court's holdings in the *Alabama Power* decisions.

In 1980, EPA attempted to justify its divergent rules for triggering Prevention of Significant Deterioration review and Nonattainment New Source Review under the Court's decisions in *Alabama Power*. 45 Fed. Reg. 52,676 (Aug. 7, 1980) (final rules), JA51. To trigger Prevention of Significant

Deterioration review, the "major emitting facility" status was determined by the potential to emit for any air pollutant, and not just for an attainment pollutant:

> Under today's action, except with respect to nonattainment pollutants, ***[Prevention of Significant Deterioration] review will apply to any source that emits any pollutant in major amounts***, if the source would locate in an area designated attainment or unclassifiable for *any* criteria pollutant . . . .

Id. at 52,710–11 (emphasis added), JA52-53. In fact, EPA explicitly rejected the notion of tying the applicability determination to an attainment pollutant:

> It should be noted that in order for [Prevention of Significant Deterioration] review to apply to a source, ***the source need not be major for a pollutant for which an area is designated attainment or unclassifiable; the source need only emit any pollutant in major amounts*** (i.e., the amounts specified in section 169(1) of the Act) and be located in an area designated attainment or unclassifiable for that or any other pollutant.

Id. at 52,711, column 1 (emphasis added).

On the other hand, EPA asserted that a "major stationary source" was subject to Nonattainment New Source Review only if it emitted a nonattainment pollutant "in major amounts," and that this conclusion was based on the Court's decision in *Alabama Power*:

> ***However, implicit in* Alabama Power *and the structure of the Act is a recognition that where nonattainment pollutants are emitted in major amounts (i.e., where a source emits in major amounts a pollutant for which the area in which the source would locate is designated nonattainment***), Part D [New Source Review] rather

> than Part C [Prevention of Significant Deterioration] review should apply to these pollutants (see below). [Prevention of Significant Deterioration] review does not apply to the nonattainment pollutants emitted by the source otherwise subject to review.

Id. at column 2 (emphasis added).

EPA's invocation of *Alabama Power* as a rationale is unreasonable. In *Alabama Power*, the Court used the phrase "major amounts" only once, in a general observation that "[t]he purpose of Congress was to require a permit before major amounts of emissions were released." *See Alabama Power I,* 606 F.2d at 1076; *see also Alabama Power II,* 636 F.2d at 353 (using substantially the same language). The context was the Court's consideration of an issue whether a facility could consider the effect of air pollution control equipment in calculating its potential to emit. *See Alabama Power I,* 606 F.2d at 1076; *see also Alabama Power II,* 636 F.2d at 353. The Court's observation was not intended to create a substantive distinction in the applicability of the two programs.

Nothing in the Court's decisions supports EPA's position that Nonattainment New Source Review applies only to facilities whose potential to emit for a nonattainment pollutant exceeds a "major amount." *See generally Alabama Power I; see generally Alabama Power II.* Unreasonably, EPA has misinterpreted a general observation by the Court and turned it into a substantive exemption from the Nonattainment New Source Review program.

E. To justify the rule, EPA unreasonably mischaracterized the statutory language relating to the construction moratorium from the 1977 Amendments.

In an attempt to support its rule with statutory authority, EPA asserted that the construction moratorium provisions in the 1977 Amendments were limited "to pollutants for which the source is major and for which the area is designated nonattainment":

> ***Major sources are subject to review under*** the Offset Ruling, section 173, and ***the construction moratorium only if they emit in major amounts the pollutant[s] for which the area is designated nonattainment***. In addition, only those nonattainment pollutants which the source emits in major amounts are subject to review or the construction moratorium.
>
> . . .
>
> ***The basic rationale for these restrictions*** is that ***section 110(a)(2)(I),*** which contains the construction moratorium, ***restricts the construction moratorium to pollutants for which the source is major and for which the area is designated nonattainment.*** Since there is no requirement similar to the one in section 165(a) that subjects a source to review for all regulated pollutants it emits once it is subject to review for one pollutant, ***preconstruction review under*** the Offset Ruling and ***section 173 is restricted in the same manner as the construction moratorium***.

45 Fed. Reg. 52,711, column 3 (emphasis added), JA53.

But EPA's assertion was incorrect. According to the plain language of the 1977 Amendments, it is clear that the construction moratorium applied to any sources that contributed to concentrations of nonattainment pollutants:

> ***Section 110 (a)(2) of the Clean Air Act is amended by*** striking out "and" at the end of subparagraph (G), striking out the period at the end of subparagraph (H), and by ***adding the following new subparagraphs at the end thereof*:**
>
> "(I) it provides that after June 30, 1979, ***no major stationary source shall be constructed or modified in any nonattainment area*** (as defined in section 171(2)) ***to which such plan applies***, if the emissions from such facility ***will cause or contribute to concentrations of any pollutant for which a national ambient air quality standard is exceeded in such area***, unless, as of the time of application for a permit for such construction or modification, ***such plan meets the requirements of part D*** (relating to nonattainment areas) . . . .

Pub. L. 95-95, §108(b), 91 Stat. 694 (adding new Section 110(a)(2)(I)) (emphasis added). Technical amendments did not change this result. *See* Clean Air Act Technical and Conforming Amendments, Pub. L. 95-190, §14(a), 91 Stat. 1393, 1399 (1977) (Safe Drinking Water Amendments of 1977). In other words, any "major stationary source" that had emissions of a nonattainment pollutant was subject to the permit requirement and construction moratorium. The statutory language did not redefine the statutory term "major stationary source" or otherwise limit applicability of Nonattainment New Source Review. Nor did it limit the pollutants whose potential to emit may trigger Nonattainment New Source Review,

to only nonattainment pollutants. The statutory language of the construction moratorium provides no legal support for EPA's rule and actually precludes it.

F. In relocating and consolidating its rule, EPA continued to unreasonably mischaracterize the Court's holdings in *Alabama Power*.

In a proposed rule in 1981, EPA incorrectly suggested that *Alabama Power* had ratified EPA's interpretation tying Nonattainment New Source Review to the emission of nonattainment pollutants in major amounts:

> However, on December 14, 1979, the United States Court of Appeals for the District of Columbia Circuit issued its final opinion in Alabama Power Co. v. Costle, 13 ERC 1993, and ***held that where a source emits in major amounts any pollutant(s) for which the area in which the source would locate is designated nonattainment, Part C [Prevention of Significant Deterioration] review should not apply to those pollutants***.

46 Fed. Reg. 9,124, 9,125 (Jan. 28, 1981) (emphasis added), JA57, 58. Although EPA did not refer specifically to the Nonattainment New Source Review program in this quotation, the highlighted language was essentially a paraphrasing of its unlawful rule.

EPA's characterization of the holding of *Alabama Power* is incorrect. The Court never "held that where a source emits in major amounts any pollutant(s) for which the area in which the source would locate is designated nonattainment, Part C Prevention of Significant Deterioration review should not apply to those pollutants." *See Alabama Power I,* 606 F.2d at 1068–93; *see Alabama Power II,*

636 F.2d at 323–411. Rather, the Court only held that the Prevention of Significant Deterioration program did not apply to a "major emitting facility" in a nonattainment area simply because it affects air quality in a neighboring attainment area. *Alabama Power II*, 636 F.2d at 368. In making this holding, the Court was addressing the issue "whether a source becomes subject to the [Prevention of Significant Deterioration] review process because of its location within an area to which this part applies, or because of its impact upon the air quality of one." *Id.* at 364. But the Court never tied this issue to whether a facility emits in "major amounts any pollutant(s) for which the area in which the source would locate is designated nonattainment." EPA inserted that language into its federal register notice in an attempt to justify its unlawful rule. *See* 46 Fed. Reg. 9,125, JA58.

EPA's mischaracterization of the holdings of *Alabama Power* and the statutory language of the construction moratorium tainted EPA's codification of the rule at 40 C.F.R. §51.165(a)(2)(i), the current location of the rule. *See* Proposed Restructuring of Existing Rule, 48 Fed. Reg. 46,152 (Oct. 11, 1983), JA59; Final Rule, 51 Fed. Reg. 40,656 (Nov. 7, 1986), JA63; Final Rule, 67 Fed. 80,186, 80,248 (Dec. 31, 2002), JA84, 90. Accordingly, EPA's rule is unreasonable and should be vacated.

CONCLUSION

EPA's rule unlawfully limits the air pollutants whose potential to emit may trigger Nonattainment New Source Review, to nonattainment pollutants. The rule violates the Clean Air Act, which requires a new "major stationary source" in a nonattainment area to undergo Nonattainment New Source Review and obtain offsets against increased emissions. In contrast, the statute does not limit the air pollutants whose potential to emit may trigger Nonattainment New Source Review, to nonattainment pollutants.

In addition, EPA's rule is unreasonable because it renders inoperative the requirements applicable to a "major stationary source" under the Nonattainment New Source Review program. EPA blurred the distinction between a "major stationary source" and a nonattainment pollutant, based its rule on the need for "simplicity," and then based it on a mischaracterization of the Court's holding in *Alabama Power* and the plain language of the 1977 Amendments relating to the statutory moratorium.

The Court should vacate the rule.

Dated: August 31, 2015

Respectfully submitted,

/s/ Christopher D. Ahlers[9]

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

(Type-Volume Limitation, Typeface Requirements, and Type Style Requirements)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,914 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word versions 2007 and 2010, in 14-point Times New Roman font.

DATED: August 31, 2015

/s/ Christopher D. Ahlers

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August, 2015 I have served the foregoing **Brief of Petitioners** on the following registered counsel through the Court's electronic filing system (ECF).

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NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 14-1138

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SIERRA CLUB DE PUERTO RICO, CIUDADANOS EN DEFENSA DEL AMBIENTE, MADRES DE NEGRO DE ARECIBO, AND COMITÉ BASURA CERO ARECIBO,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY AND GINA MCCARTHY IN HER OFFICIAL CAPACITY AS ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondents,

ENERGY ANSWERS ARECIBO, LLC,

Intervenor-Respondents.

PETITION FOR REVIEW OF A FINAL RULE OF THE EPA

RESPONSE BRIEF FOR THE EPA RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), undersigned counsel for Respondents U.S. Environmental Protection Agency and Gina McCarthy submits this certificate as to parties, rulings, and related cases:

A. Parties and Amici. All parties, intervenors, and amici appearing in this Court are listed in the Brief for Petitioners.

B. Rulings Under Review. Petitioners seek review of, and a remedy regarding, a nationally applicable final rule promulgated by the U.S. Environmental Protection Agency over 35 years ago, *Requirements for Preparation, Adoption, and Submittal of SIPS; Approval and Promulgation of State Implementation Plans*, 45 Fed. Reg. 31,307, 31,312 (May 13, 1980) (Joint Appendix ("JA") 19, 23). Since 1986, this rule has been codified at 40 C.F.R. § 51.165(a)(2)(i); it is reproduced in this Brief's Statutory and Regulatory Addendum.

C. Related Cases. There are no related cases.

/s/Andrew J. Doyle
Counsel for Respondents

Dated: August 28, 2015

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TABLE OF AUTHORITIES

U.S. Constitution

Statutes

* Authorities chiefly relied upon are marked with an asterisk.

* Authorities chiefly relied upon are marked with an asterisk.

Case law

* Authorities chiefly relied upon are marked with an asterisk.

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* Authorities chiefly relied upon are marked with an asterisk.

* Authorities chiefly relied upon are marked with an asterisk.

Regulations

* Authorities chiefly relied upon are marked with an asterisk.

Federal Register Publications

Legislative Materials

* Authorities chiefly relied upon are marked with an asterisk.

Other Authorities

* Authorities chiefly relied upon are marked with an asterisk.

GLOSSARY

Act	Clean Air Act
Chevron	*Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)
Coalition	*Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012), *aff'd in part and rev'd in part sub nom. Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014)
Energy Answers	Intervenor-Respondent Energy Answers Arecibo, LLC
EPA	Respondents U.S. Environmental Protection Agency and its Administrator
Handbook	Clean Air Act Handbook (D.R. Wooley & E.M. Morss eds., 24th ed., 2014)
JA	Joint Appendix
Sierra Club	Petitioners Sierra Club de Puerto Rico, Ciudadanos en Defensa del Ambiente, Madres de Negro de Arecibo, and Comité Basura Cero Arecibo
Sierra Club Br.	Opening Brief of Petitioners (Aug. 2015)
SIP	State Implementation Plan
UARG	*Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014)

STATEMENT OF JURISDICTION

Petitioners Sierra Club de Puerto Rico, Ciudadanos en Defensa del Ambiente, Madres de Negro de Arecibo, and Comité Basura Cero Arecibo (collectively "Sierra Club") fail to properly invoke the Court's jurisdiction to review a nationally applicable regulation promulgated in 1980 by Respondents U.S. Environmental Protection Agency and its Administrator (collectively "EPA") under the Clean Air Act ("Act"). Jurisdiction is lacking on two grounds: standing, *see infra* pp. 24-27, and timing, *see infra* pp. 27-40.

STATEMENT OF THE ISSUES

1. A petitioner lacks standing if its requested relief will not redress the claimed injury. Sierra Club alleges injury from lead emissions from an incinerator proposed by Intervenor-Respondent Energy Answers Arecibo, LLC's ("Energy Answers"), but Sierra Club merely seeks vacatur of a regulation that does not require Energy Answers to do, or refrain from doing, anything regarding emissions. Such relief will not result in more lead emissions controls unless Energy Answers modifies the incinerator at a speculative and unforeseen point in the future. Does Sierra Club lack standing to challenge the regulation?
2. To ensure that challenges to EPA's regulations are raised promptly, the Act limits the Court's jurisdiction to petitions filed "within sixty days from the date notice of such promulgation . . . appears in the Federal Register" or, "if

such petition is based solely on grounds arising after such sixtieth day, then any petition for review . . . filed within sixty days after such grounds arise." 42 U.S.C. § 7607(b)(1). Sierra Club, which did not file its petition in 1980, alleges that grounds for its claim arose, for the first time, when Energy Answers obtained a permit under a program that does not apply to the incinerator's lead emissions and is separate from the program to which the challenged regulation applies. Is Sierra Club's petition time-barred?

3. Under the Act, with respect to areas that have not attained an air quality standard, states and territories must require permits for the construction or operation of a source with the potential to emit 100 tons per year of "any air pollutant." 42 U.S.C. §§ 7502(c)(5), 7602(j). Under *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014) ("*UARG*"), EPA must interpret that specific statutory phrase in light of its context. The challenged regulation, 40 C.F.R. § 51.165(a)(2)(i), reflects EPA's longstanding interpretation of "any air pollutant" in the context of permitting in nonattainment areas as referring only to a pollutant for which the area is designated nonattainment. Does that regulation fall within the bounds of EPA's statutory authority?

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutory provisions and the challenged regulation are reproduced in this Brief's Statutory and Regulatory Addendum.

STATEMENT OF THE CASE

I. New Source Review under the Act and State Implementation Plans

Under the Act, "the States and the Federal Government [are] partners in the struggle against air pollution." *General Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). EPA establishes national ambient air quality standards for criteria pollutants. 42 U.S.C. § 7409.[1] "To date, EPA has issued [standards] for six pollutants: sulfur dioxide, particulate matter, nitrogen dioxide, carbon monoxide, ozone, and lead." *UARG*, 134 S. Ct. at 2435 (citation omitted). The standard for lead, the pollutant Sierra Club focuses on here, was last updated in 2008. *Coalition of Battery Recyclers Ass'n v. EPA*, 604 F.3d 613 (D.C. Cir. 2010) (upholding that standard).

"States [and territories[2]] have the primary responsibility for implementing the NAAQS by developing 'State [I]mplementation [P]lans.'" *UARG*, 134 S. Ct. at 2435 (citing 42 U.S.C. § 7410). State Implementation Plans ("SIPs") approved under the Act must regulate, *inter alia*, the construction and modification of stationary sources of air pollution. Such regulation includes a preconstruction permit program known as "New Source Review," which has three parts. *See* 73 Fed. Reg. 28,321, 28,323-34 (May 16, 2008).

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[1] Unless otherwise specified, we quote from the current U.S. Code.
[2] The Act defines "States" to include the Commonwealth of Puerto Rico and other U.S. territories. 42 U.S.C. § 7602(d).

The first part of New Source Review generally requires that any new or modified major stationary source obtain and comply with a "Prevention of Significant Deterioration" permit addressing: (a) in the case of new construction, pollutants for which the source has the potential to emit in significant amounts; and (b) in the case of a modification, each pollutant that is projected to increase (or in fact increases) by a significant amount. *See* 42 U.S.C. §§ 7475, 7479(1); *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 471 (2004). The applicability of the Prevention of Significant Deterioration permit program depends on, *inter alia*, the pollutant in question; i.e., it could apply only if the source is located in an area that has been designated as "attainment" or "unclassifiable" with respect to such pollutant. Attainment areas meet national ambient air quality standards for a given pollutant; unclassifiable areas lack sufficient data to determine attainment. 42 U.S.C. § 7407(d)(1)(A).

The second -- and separate -- part of New Source Review is the "Nonattainment New Source Review" program. 42 U.S.C. §§ 7501-15; Clean Air Act Handbook § 4:1 (D.R. Wooley & E.M. Morss eds., 24th ed., 2014) ("Handbook"). This program has relevance where the source in question is located in a "nonattainment" area. EPA designates an area nonattainment when it fails to meet standards for a particular pollutant. 42 U.S.C. § 7407(d)(1)(A). Unlike the Act's Prevention of Significant Deterioration program, which directly prohibits the construction of new or modified sources without a permit and is a required part of State (or Federal) Implementation Plans, the Act's Nonattainment New Source

Review program relies entirely on State (or Federal) Implementation Plans to regulate covered sources. *See* 42 U.S.C. §§ 7502, 7503.

Air quality controls set forth in Nonattainment New Source Review permits are generally more stringent than those associated with Prevention of Significant Deterioration permits. Sources subject to Prevention of Significant Deterioration permits, for example, may only emit consistent with the "best available control technology" "for each pollutant subject to regulation under" the Act. 42 U.S.C. § 7475(a)(4). But state Nonattainment New Source Review programs must require permits that subject sources to, for example, the "lowest achievable emission rate" without regard to cost, 42 U.S.C. § 7503(a)(2), and "offsets," *id.* § 7503(c)(1).[3] In addition, nonattainment programs within SIPs may require other (i.e., extra-permit) emission-reduction measures as part of states' and territories' obligation to make "reasonable further progress" toward attainment. 42 U.S.C. §§ 7501(1), 7502(c)(2).

The third part of new source review, known as the "Minor New Source Review" program, may apply to the extent that a stationary source would emit a pollutant below specified levels. 76 Fed. Reg. 38,748, 38,752 (July 1, 2011); 45 Fed. Reg. 52,676, 52,712 (Aug. 7, 1980) (JA 51, 54). Under this program, states and

[3] Offsets represent "[a] key method for controlling air pollution without impeding new economic activity . . . . Under this strategy, the relevant air pollution control authority . . . will permit the creation of a new source of emissions only if the new polluter is able to secure an offsetting reduction in emissions from preexisting polluters[.]" *Santa Barbara County Air Pollution Control Dist. v. EPA*, 31 F.3d 1179, 1181 (D.C. Cir. 1994).

territories assess the air quality implications of source construction or modification and evaluate whether that event would interfere with attainment or maintenance of standards. *See* 40 C.F.R. §§ 51.160-64.

Because the requirements of these programs are pollutant-specific, a major source may be required to obtain both a Prevention of Significant Deterioration permit and a Nonattainment New Source Review permit where it proposes to construct and operate in an area that is designated attainment or unclassifiable for some pollutants and non-attainment for others. *See Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 132 (D.C. Cir. 2012) ("*Coalition*"), *aff'd in part and rev'd in part on other grounds sub nom. Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014); *Alabama Power Co. v. Costle*, 636 F.2d 323, 350 (D.C. Cir. 1979); 45 Fed. Reg. at 52,711-12 (JA 53-54). In such an area, the source may also be required to obtain a Minor New Source Review permit if its emissions of a particular pollutant are low or only increase by an insignificant amount.

II. Promulgation of 40 C.F.R. § 51.165(a)(2)(i)

Under the Act, the EPA Administrator "is authorized to prescribe such regulations as are necessary to carry out [her] functions under [the Act]." 42 U.S.C. § 7601(a)(1). The regulation sought to be challenged by Sierra Club here, 40 C.F.R. § 51.165(a)(2)(i), regards the Nonattainment New Source Review permit program.

In September 1979, EPA issued a proposal for public comment: a subsection would be added to EPA's existing regulations that set forth the required contents for

"state plans for nonattainment areas." 44 Fed. Reg. 51,924, 51,958 (Sept. 5, 1979) (proposing to codify 40 C.F.R. § 51.18(j)(3)) (JA 45, 49). Under the proposal, SIPs would be required to include "[a] preconstruction review program . . . for any area designated as nonattainment for any national ambient air quality standard," and to apply that program "to any new or modified major stationary source that is *major* for the pollutant for which the area is designated nonattainment[.]" 44 Fed. Reg. at 51,959 (emphasis added) (JA 50). As EPA explained, the application of Nonattainment New Source Review permit requirements to "major sources everywhere in the designated nonattainment area" was an expansion of the policy at the time, which offered exemptions to any source demonstrating that, for example, because of its location, "it would not significantly impact the specific point(s) of violation." 44 Fed. Reg. at 51,939 (JA 46).

Moreover, EPA's proposal addressed both new and modified major stationary sources. As to modifications, EPA explained:

> Under today's proposal . . . the [New Source Review] requirements of section 173 [42 U.S.C. § 7503], the offset ruling, or the section 110(a)(2)(I) construction restrictions would apply only to a modification which would result in a significant net increase in the amount of the nonattainment pollutant which the source already emits in major amounts (i.e., 100 or more tons per year).

44 Fed. Reg. at 51,941 (JA 48). Similarly, as to entirely new sources in nonattainment areas, EPA stated: "[n]onattainment review applicability again requires that the nonattainment pollutant be potentially emitted in major amounts." *Id.*

Among the sources of authority EPA referenced in its September 1979 proposal was then-section 110(a)(2)(I) of the Act, which Congress added to the Act in 1977 (and repealed in 1990). That provision, known as the "construction moratorium" or "construction ban," *see, e.g., Michigan v. Thomas*, 805 F.2d 176 (6th Cir. 1986), generally had the effect of prohibiting, after a date certain (targeted to the submission and review of SIPs), the construction or modification of any "major stationary source . . . in any nonattainment area" "if the emissions from such facility will cause or contribute to concentrations of any pollutant for which a national ambient air quality standard is exceeded in such area" unless and until the state or territory submits and obtains EPA's approval of a SIP with a compliant Nonattainment New Source Review permit program. *See* former section 172(a)(1), 42 U.S.C. § 7502(a)(1) (1982), and former section 110(a)(2)(I), 42 U.S.C. § 7410(a)(2)(I) (1982). Although the legislative history does not directly address the moratorium's purposes,[4] an appellate court at the time concluded that Congress sought both to limit pollution from new sources and to prompt state planning efforts. *See Connecticut Fund for the Env't v. EPA*, 672 F.2d 998, 1008 (2d Cir. 1982).

Also referenced in the September 1979 proposal was EPA's "offset ruling," 41 Fed. Reg. 55,524 (Dec. 21, 1976) (JA 26), an action in which "EPA endeavored to clarify . . . the circumstances in which new sources of pollution would be permitted in

[4] The construction moratorium originated in the Senate bill. S. Rep. 127, 95th Cong., 1st Sess. (1977).

areas where an ambient standard had not been achieved." *NRDC v. Gorsuch,* 685 F.2d 718, 721 (D.C. Cir. 1982), *rev'd on other grounds sub nom. Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837 (1984). Under the offset ruling, permit authorities were directed to "perform an air quality analysis to determine if the [new] source will cause or exacerbate a violation of [national ambient air quality standards]" -- but "only for those pollutants causing the proposed source to be defined as a 'major' source[.]" 41 Fed. Reg. at 55,528 & n.2 (JA 28). EPA explained that such interpretation was appropriate because federal, state, and territorial permit authorities "have limited resources and . . . smaller air pollution sources may individually have an insignificant impact on air quality." *Id.* at 55,525 (JA 27). As part of the 1977 Amendments to the Act, Congress codified the offset ruling. *See* 91 Stat. 745 (offset ruling "shall apply" in nonattainment areas until July 1, 1979).[5]

Interested persons submitted comments to EPA about the September 1979 proposal. Some comments supported additional regulation. For example, Sierra Club Legal Defense Fund urged that "major emitting facilities in a nonattainment area should undergo [Prevention of Significant Deterioration] review on all pollutants -- not only for major pollutants for which the area is nonattainment." A-79-35, III-B, Comment 298 at cover, 4 (JA 10, 14). And in a comment similar to Sierra Club's

[5] Further, the offset ruling "was later amended to conform to the 1977 Amendments to the Clean Air Act and codified as Appendix S to 40 C.F.R. Part 51." *NRDC,* 685 F.2d at 721 n.13 (citation omitted).

challenge here, the Connecticut Chapter of the Sierra Club disagreed with the limitation that Nonattainment New Source Review permits be required "only [for] the pollutant for which [the source] is a major source[.]" A-79-35, III-B, Comment 84 at 1, 2 (JA 1-2). That chapter of Sierra Club regarded EPA's proposal as "not in agreement with the intentions of Congress." *Id.* at 2 (JA 2).

EPA also received comments to the effect that its proposal was over-inclusive. The Regional Air Pollution Control Agency of Dayton, Ohio, for example, urged EPA to "reconsider this position and not impose the restrictions on sources which have no significant impact on the nonattainment situation." A-79-35, III-B, Comment 38 at cover, 3 (JA 3, 6).

In May 1980, upon consideration of those and other comments, EPA finalized its proposal and codified what was then 40 C.F.R. § 51.18(j). 45 Fed. Reg. 31,307, 31,312 (May 13, 1980) (JA 19, 23).[6] Although EPA did not elaborate on its interpretation, it noted that "[a] source may emit many different pollutants" and that "an area may be designated attainment for certain criteria pollutants and

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[6] 40 C.F.R. § 51.18(j) at that time provided:

> Each plan shall adopt a preconstruction review program to satisfy the requirements of sections 172(b)(6) and 173 of the Act for any area designated nonattainment for any national ambient air quality standard . . . . Such a program shall apply to any new major stationary source or major modification that is major for the pollutant for which the area is designated nonattainment . . . .

nonattainment for other criteria pollutants." 45 Fed. Reg. at 31,309 n.3 (JA 21). "For simplicity," EPA stated that its preamble employed a shorthand phrase, "sources locating in a nonattainment area," to refer to "sources locating in an area designated nonattainment for a pollutant for which the source is major." *Id.*

Shortly thereafter, in August 1980, EPA amended 40 C.F.R. § 51.18(j) by moving the relevant text to subsection (2). 45 Fed. Reg. 52,676, 52,745 (Aug. 7, 1980) (JA 51, 56). EPA explained that "[t]he current regulations concerning pollutant applicability in nonattainment areas have not been changed" because the August 1980 rulemaking largely regarded the separate Prevention of Significant Deterioration program. 45 Fed. Reg. at 52,711 (JA 53). But EPA at that point further explained *why* the Nonattainment New Source Review permit program has a pollutant applicability scheme distinct from the Prevention of Significant Deterioration permit program:

> These rules are different from the [Prevention of Significant Deterioration] pollutant applicability rules. Major sources are subject to review under the Offset Ruling, section 173, and the construction moratorium only if they emit in major amounts the pollutant(s) for which the area is designated nonattainment. In addition, only those nonattainment pollutants which the source emits in major amounts are subject to review or the construction moratorium. Similarly, only if a modification increases emissions of a pollutant for which the source is major and for which the area is designated nonattainment do nonattainment requirements apply.

45 Fed. Reg. at 52,711 (JA 53). EPA emphasized:

> The basic rationale for these restrictions is that section 110(a)(2)(I), which contains the construction moratorium, restricts the construction

> moratorium to pollutants for which the source is major and for which the area is designated nonattainment. Since there is no requirement similar to the one in section 165(a) that subjects a source to review for all regulated pollutants it emits once it is subject to review for one pollutant, preconstruction review under the Offset Ruling and section 173 is restricted in the same manner as the construction moratorium.

Id. Similarly, EPA addressed comments "perceiv[ing] an inconsistency in requiring broader pollutant applicability for [Prevention of Significant Deterioration] review than for nonattainment review . . . ." 45 Fed. Reg. at 52,713 (JA 55). EPA explained that "[t]he scope of [Prevention of Significant Deterioration] review applicability and the nonattainment definition of source are separate issues[,]" and that "there is no basis for requiring that they be resolved in such a way as to in some manner equalize their effects." *Id.*

EPA also emphasized that other measures, such as "reasonable further progress," are available to states and territories and do not depend on a source's "major" status:

> [S]ection 173 [42 U.S.C. § 7503] . . . governs the specific review of sources emitting nonattainment pollutant(s) in major amounts. In addition, sources emitting the nonattainment pollutants in minor amounts are subject to the general [New Source Review] contained in SIPS, and the impacts of such sources are accounted for in demonstrations of reasonable further progress and within the growth allowance provisions of the SIP.

45 Fed. Reg. at 52,713 (JA 55). *See also* 42 U.S.C. § 7503(1)(A) (1982) (offsets may take the form of reductions in allowable emissions "from new . . . sources which are not major emitting facilities").

In 1986, 40 C.F.R. § 51.18(j)(2) was re-codified as 40 C.F.R. § 51.165(a)(2)(i). *See* 51 Fed. Reg. 40,656, 40,672 (Nov. 7, 1986) (JA 63, 67).

III. New Source Review in Puerto Rico

As noted *supra* p. 3, the Act contemplates that states and territories will have the primary role in implementing the New Source Review permit programs. But EPA may administer the Prevention of Significant Deterioration permit program where a state or territory lacks an EPA-approved program. 42 U.S.C. § 7410(a)(2)(C), (c)(1); 40 C.F.R. § 52.21(a)(1). That is the scenario in Puerto Rico, where an EPA regional office, EPA Region 2, issues Prevention of Significant Deterioration permits while the Puerto Rico Environmental Quality Board conducts review and issues permits under the Commonwealth's EPA-approved Nonattainment New Source Review and Minor New Source Review programs. *See* 40 C.F.R. §§ 52.2722, 52.2723, and 52.2729; 62 Fed. Reg. 3,211 (Jan. 22, 1997); www.epa.gov/nsr/live/pr.html (last visited May 26, 2015).

Nonattainment areas have existed in Puerto Rico since at least 1991. *See Pan American Grain Mfg. Co. v. EPA*, 95 F.3d 101, 103 (1st Cir. 1996) (involving nonattainment in Guaynabo). In late 2011, EPA designated the following portion of Arecibo as a nonattainment area for lead: the "[a]rea bounded by 4 km from the boundaries of the Battery Recycling Company facility." 40 C.F.R. § 81.355; 76 Fed. Reg. 72,097, 72,119 (Nov. 22, 2011) (JA 117, 119). Following that designation, Puerto Rico proposed an update to its SIP. EPA Region 2, which is reviewing the proposal,

recently indicated that "the primary source responsible for the nonattainment designation in Arecibo is the Battery Recycling Facility," and that "other facilities in Arecibo are very small contributors of lead." EPA Region 2 Letter of Apr. 24, 2015 to Petitioner Madres de Negro de Arecibo at 1 (JA 359).

IV. Energy Answers' Air Quality Control Permits

A. Prevention of Significant Deterioration Permit from EPA Region 2

In February 2011, Energy Answers submitted an application for a Prevention of Significant Deterioration permit to EPA Region 2. *See* Application excerpts (JA 123-162). Energy Answers described its proposed facility as an incinerator that would generate renewable energy from fuel derived from waste. Application at xi-xii (JA 123-124). The incinerator's location would be an 80-acre site, zoned as "heavy industrial," which was located more than a mile from Arecibo's "largest residential and commercial areas." *Id.* at 2-1, 2-2 (JA 125, 126).

The application addressed, in detail, the facility's potential to emit pollutants. *See id.* at 3-1 through 4-25 (JA 127-155). Pollutants to be emitted in "major" amounts (i.e., more than 100 tons/year) included, for example, sulfur dioxide and carbon monoxide. *Id.* at xi and Table 3-1 (JA 123, 130).

Lead was also addressed in Energy Answers' application. At that time, the area surrounding the Battery Recycling Company -- which encompasses the Energy Answers site, *see* Application at Appendix D (JA 158) -- had not yet been designated nonattainment for lead. Thus, Energy Answers' application addressed lead since it

was then an attainment pollutant. As Sierra Club correctly notes, Energy Answers' Prevention of Significant Deterioration permit application "lists potential lead emissions as 0.31 tons/year[.]" Sierra Club Br. 3 (citing Application at 3-4, Table 3-1 (JA 130)). That amount of emissions is well under the significance threshold of 0.6 tons/year, *see* Application at Table 3-1 (JA 130),[7] and nowhere close to the "major source" threshold of 100 tons per year. 42 U.S.C. § 7602(j).[8] Energy Answers also explained its view that it would operate with the "best available control technology" for lead. *See* Application at 5-37 (JA 156); *supra* p. 5.

In May 2012, EPA Region 2 announced, through a public notice, its "preliminary determination to approve" Energy Answers' Prevention of Significant Deterioration permit application because it "meets all PSD requirements." Public Notice at 2 (JA 166). The public notice listed over 12 pollutants that would be subject to the best available control technology; because of the intervening nonattainment designation, lead was not listed. *See id.* The agency solicited comment on the application and draft permit, and it also scheduled public informational

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[7] Significance thresholds have relevance for modifications of existing sources. Handbook § 4:11 ("As with nonattainment [New Source Review], assuming the facility is 'major,' and that the change is not specifically excluded from the definition of modification, the owner or operator must determine if the emissions increase associated with the modification is significant."); *see also id.* § 4.6 & Table 4.1 (listing lead's significance threshold).

[8] But "[l]ead is also regulated as a hazardous air pollutant under Title III of the [Act]," Handbook § 4.6 n.7, which has a major source threshold of 10 tons per year. *See* 42 U.S.C. § 7412.

sessions and hearings. *Id.* at 2-3 (JA 166-167). In addition, EPA provided a street address and Web link where interested persons may access the administrative record. *Id.* at 3 (JA 167).

More detail about the project was provided in a "fact sheet" that accompanied the public notice. *See* Fact Sheet (JA 176-199). EPA Region 2 explained, in pertinent part:

- "Currently, the area in which Energy Answers' facility is designated as meeting all National Ambient Air Quality Standards [] promulgated to protect public health, except for lead (Pb)." Fact Sheet at 3 (JA 178).
- "Pb . . . is not included in this permit because the applicant proposes to locate the source in a nonattainment area." *Id.* at 13 n.1 (JA 188).
- "[A]ll air pollutants that are not subject to [Prevention of Significant Deterioration], including Pb, . . . will be addressed in the State permit issued by [the Puerto Rico Environmental Quality Board]." *Id.* at 18 (JA 193).

Further, in May 2012, EPA Region 2 transmitted English and Spanish versions of the public notice and fact sheet directly to a number of interested persons, including Sierra Club. *See* EPA Region 2 Letter to Petitioner Sierra Club de Puerto Rico (JA 170-171); EPA Region 2 Letter to Petitioner Ciudadanos en Defensa del Ambiente (JA 172-173); EPA Region 2 Letter to Javier Biaggi of Petitioner Comité

Basura Cero Arecibo (and of Comité Amplio de Arecibo Contra el Incinerador, which shares the same address) (JA 174-175); *see also* Energy Answers Arecibo, LLC Interested Parties List at 4 (EPA emailed public notice and fact sheet to Petitioner Madres de Negro de Arecibo) (JA 169).

"During the public comment period, EPA received 1,100 written comments," EPA Region 2 Response to Comments at 5 of 124 (JA 204), including comments from Sierra Club or its members. In April 2013, when responding to comments about lead emissions, EPA Region 2 repeated what it had previously explained in the public notice and fact sheet: that the Prevention of Significant Deterioration program does not regulate that nonattainment pollutant. *See, e.g.*, EPA Region 2 Response to Comments at 75 ("[F]or information related to the [Energy Answers'] project Pb emissions requirements, the commenters should consult with the [Puerto Rico Environmental Quality Board] Air Quality Department.") (JA 206); *id.* at 99 ("The [Prevention of Significant Deterioration] program does not apply in nonattainment areas. Therefore, lead is not a pollutant regulated in [the] permit.") (JA 207); *id.* ("Energy Answers is not subject to the nonattainment permit regulations since it would have to emit 100 tons per year of lead. Since the facility will emit less than this major source threshold it is also not subject to nonattainment permit requirements."); *id.* at 108 ("Energy Answers is not subject to the lead nonattainment permit requirements.") (JA 209).

At the initiation of several interested persons, including Sierra Club or its members, EPA's Environmental Appeals Board reviewed the initial Prevention of Significant Deterioration permit that EPA Region 2 had issued in June 2013. *See* 40 C.F.R. part 124, subpart A (procedures applicable to administrative appeals of PSD permits). In March 2014, the Environmental Appeals Board issued a lengthy decision upholding the permit in all relevant respects. *See* Board Opinion (JA 243-340).[9] In response to arguments from Sierra Club that 40 C.F.R. § 51.165(a)(2)(i) is "unlawful," Sierra Club Br. 6, the Environmental Appeals Board stated: "the Region properly excluded lead [] from the [Prevention of Significant Deterioration] permitting process because the municipality of Arecibo has been designated as a nonattainment area for lead. Additionally, . . . [Sierra Club's] arguments concerning [Nonattainment New Source Review] applicability lie outside the Board's authority to decide." Board Opinion at 22 (JA 265). *See also id.* at 22-28 (JA 265-271).

EPA Region 2 issued the final Prevention of Significant Deterioration permit in April 2014, and a notice was published a month later. *See* 79 Fed. Reg. 28,710 (May 19, 2014) (JA 120-122).

[9] EPA Region 2 requested, and was granted, a remand for the limited purpose of regulating biogenic greenhouse gas emissions in light of *Ctr for Biological Diversity v. EPA*, 722 F.3d 401 (D.C. Cir. 2013). That issue has no bearing on this case.

B. Minor New Source Review Conditions in Puerto Rico's Permit

As EPA Region 2 noted in its public notice regarding Energy Answers' Prevention of Significant Deterioration permit application, "[a] separate permit is being issued by Puerto Rico Environmental Quality Board, to address the other pollutants emitted by this project." Public Notice at 2 (JA 166). In December 2014, the Puerto Rico Environmental Quality Board issued that permit. Regarding lead, it functions as a Minor New Source permit and restricts the incinerator's emissions to 0.31 tons/year, consistent with Energy Answers' previous assertion that its operations would reflect the best available control technology. *See* Construction Permit PFE-07-0811-0468-I-II-III-C at Table of Annual Emission Limits (in Spanish) (JA 210).

V. Proceedings in this Court

On July 14, 2014, Sierra Club filed a petition with this Court, seeking review of 40 C.F.R. § 51.165(a)(2)(i) based on an argument that it "unlawfully limits the preconstruction review program for nonattainment areas under Sections 172(c)(5) and 173 of the Clean Air Act [42 U.S.C. §§ 7502(c)(5), 7503] to a new major stationary source 'that is major for the pollutant for which the area is designated nonattainment.'" Petition for Rev., Doc. #1503791, at 2 (citation omitted).[10]

[10] The petition also purported to seek review of EPA Region 2's "decision granting a Prevention of Significant Deterioration permit to Energy Answers Arecibo, LLC, and the decision of the Environmental Appeals Board dated March 25, 2014." Petition for Rev. at 1. But Sierra Club has since abandoned any such claim.

EPA moved to dismiss the petition on jurisdictional grounds. Doc. #1512121. Following Sierra Club's opposition, the Court issued an Order carrying the motion with the case and directing the parties "to address [in their briefs] the issues presented in the motion to dismiss rather than incorporate those arguments by reference." Order of Jan. 16, 2015, Doc. #1532690.

Sierra Club's opening brief followed.

SUMMARY OF ARGUMENT

Sierra Club lacks standing because its alleged injuries from Energy Answers' facility are not redressable by the Court. Vacatur of the challenged regulation, 40 C.F.R. § 51.165(a)(2)(i), would have no effect on Energy Answers' ability to construct and operate its facility because that regulation does not govern Energy Answers' emissions of any pollutant, including lead. That regulation and, indeed, the Act's Nonattainment New Source Review program only govern the required contents of Puerto Rico's State Implementation Plan. Only Puerto Rico's State Implementation Plan governs Energy Answers' emissions of lead. At most, vacatur of the challenged regulation could eventually result in Puerto Rico having to revise its State Implementation Plan to cover a broader category of stationary sources after EPA amends the challenged regulation to conform to the judicial opinion Sierra Club seeks. But those changes would only have prospective effect; Energy Answers would need to modify its facility in the future -- a speculative future event -- before its emissions

would be subject to the Nonattainment New Source Review permit requirements in any such revised State Implementation Plan.

In addition, Sierra Club's petition for review of 40 C.F.R. § 51.165(a)(2)(i) is untimely and should be dismissed for lack of jurisdiction. The Act provides explicit deadlines for challenging EPA rulemakings. A petition for review must be filed within 60 days of publication in the Federal Register, or if the petition is "based *solely* on grounds arising after such sixtieth day," within 60 days of the alleged after-arising grounds. 42 U.S.C. § 7607(b)(1) (emphasis added). Sierra Club's argument that the Court has jurisdiction based on after-arising grounds is seriously flawed. Evident on its face, the after-arising grounds exception is much narrower than Sierra Club contends. After-arising grounds may appropriately be found to exist where the petition is based on substantive legal arguments that were unavailable during the initial review period. The arguments in support of the claim Sierra Club seeks to adjudicate here were capable of being raised -- and, in fact, were raised -- in 1980.

Moreover, EPA Region 2's issuance of a permit to Energy Answers under the Act's Prevention of Significant Deterioration program cannot, as a matter of law, provide grounds to challenge 40 C.F.R. § 51.165(a)(2)(i), which has no bearing on any term or condition in that permit. Any potentially cognizable after-arising ground arose much earlier -- i.e., *years* before Sierra Club filed its petition -- when Sierra Club learned that Energy Answers' potential to emit lead would not, in the words of the

challenged regulation, be "major for the pollutant for which the [Arecibo] area is designated nonattainment[.]" 40 C.F.R. § 51.165(a)(2)(i).

If the Court were to consider the merits of Sierra Club's challenge to 40 C.F.R. § 51.165(a)(2)(i), despite its petition's jurisdictional flaws, that 35-year old regulation is reasonable and entitled to deference. Under *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014), the Act-wide definition of "major stationary source," including its reference to "any air pollutant," must be construed in a manner appropriate to its regulatory context. Here, the applicable context is the Nonattainment New Source Review permit program, and pertinent provisions of the Act, old and new, reflect an association between that permit program and the pollutant or pollutants for which the area is nonattainment. In addition, EPA explained its interpretation, distinguishing that permit program from the Act's Prevention of Significant Deterioration permit program, and pointing to Nonattainment New Source Review programs that can target problematic sources without regard to their "major" status.

Thus, because EPA's interpretation of the Act is supported by the Act and reasonably explained, Sierra Club's petition lacks merit.

STANDARD OF REVIEW

The Court conducts a *de novo* review of standing, *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1323 (D.C. Cir. 2013), which Sierra Club bears the burden of demonstrating. *See Delta Const. Co. v. EPA*, 783 F.3d 1291, 1295 (D.C. Cir. 2015). Another *de novo* question is the Court's jurisdiction under section 307(b)(1) of the Act,

42 U.S.C. § 7607(b)(1), which Sierra Club must similarly establish. *See, e.g., Environmental Defense v. EPA*, 467 F.3d 1329, 1333-34 (D.C. Cir. 2006).

If Sierra Club has standing and properly invokes the Court's jurisdiction, EPA is entitled, on the merits, to a high degree of deference. Under the familiar two-step framework set forth in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), the Court and EPA must adhere to Congress' clearly-stated intent (step one); however, if the Act is silent or ambiguous as to "the precise question at issue," *id.* at 842, then EPA's interpretation should be upheld so long as it is a reasonable interpretation of the statute (step two). *Id.* at 843-44. EPA's interpretation need not "represent[] the best interpretation of the statute," only a "reasonable one." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 744-45 (1996).

ARGUMENT

The Court lacks jurisdiction over Sierra Club's challenge for two reasons. Section I explains that Sierra Club lacks standing because the relief it seeks, vacatur of 40 C.F.R. § 51.165(a)(2)(i), would not redress its alleged injury. *See infra* pp. 24 to 27. Section II explains that Sierra Club filed its petition too late under the mandatory deadlines set forth in 42 U.S.C. § 7607(b)(1). *See infra* pp. 27 to 40. And Section III explains that even if jurisdiction exists, Sierra Club's attempt to invalidate a decades-old regulation is without merit. *See infra* pp. 40 to 53.

I. Sierra Club Lacks Standing under Article III of the U.S. Constitution.

Article III of the U.S. Constitution limits the Court's jurisdiction to cases and controversies, and "[t]his limitation requires a plaintiff to show that it has standing to sue[.]" *Teton Historic Aviation Foundation v. U.S. Dept. of Defense,* 785 F.3d 719, 724 (D.C. Cir. 2015). The element of standing lacking here is redressability, defined as "a 'substantial likelihood' that the requested relief will remedy the alleged injury in fact." *Id.* (quoting *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens,* 529 U.S. 765, 771 (2000)).

Sierra Club links its alleged injury with Energy Answers' current plan to construct and operate a lead-emitting facility. *See* Sierra Club Br. 18 ("Each of the standing declarants has set forth particularized facts demonstrating that the construction of the incinerator affects them personally."). But even if the Court granted the only relief Sierra Club seeks -- vacatur of 40 C.F.R. § 51.165(a)(2)(i) -- it would have no effect on that facility. By its terms, the challenged regulation applies to states and territories regarding the required contents of their SIPs. It does not govern the conduct of Energy Answers or any other source. Sierra Club is therefore mistaken when it assumes that it is the challenged regulation, rather than the Puerto Rico SIP that EPA long ago approved as conforming to that regulation, that

"exempts" the incinerator. Sierra Club Br. 22.[11] Because the challenged regulation sets forth no requirements for Energy Answers itself, vacating it would not redress Sierra Club's alleged injury. *See Delta Const.*, 783 F.3d at 1297 (redressability lacking where "a separate action . . . independently causes the same alleged harm as the challenged action").

The challenged regulation mirrors the framework of the Act. The Nonattainment New Source Review provisions of the Act, 42 U.S.C. §§ 7501-15, enumerate requirements only for SIPs. For example, section 172(c), 42 U.S.C. § 7502(c), begins by stating that "[t]he *plan provisions* . . . required to be submitted under this part shall comply with each of the following: . . ." (Emphasis added.) Likewise, section 173(a)(1)(B), 42 U.S.C. § 7503(a)(1)(B), provides that "[t]he *permit program* required by section [172(c)(5)[12]] shall provide that permits to construct and operate may be issued if . . . ." (Emphasis added.) In turn, section 172(c)(5), 42 U.S.C. § 7502(c)(5), states that "[s]uch *plan provisions* shall require permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area." (Emphasis added.)

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[11] Sierra Club does not (and cannot here) challenge either the Puerto Rico SIP or EPA's approval of the SIP.

[12] This provision actually references section 172(b)(6) from the pre-1990 version of the Act. Under the Act as amended in 1990, the correct cross reference is section 172(c)(5). *Accord* Sierra Club Br. 9 n.7.

In this regard, Nonattainment New Source Review differs from the Prevention of Significant Deterioration permit program. The latter program itself prohibits the construction or modification of a non-conforming source. *See, e.g., UARG*, 134 S. Ct. at 2435 ("It is unlawful to construct or modify a 'major emitting facility' in 'any area to which [the PSD program] applies' without first obtaining a permit.") (citing 42 U.S.C. §§ 7475(a)(1), 7479(2)(C)); *Sierra Club v. Jackson*, 648 F.3d 848, 851-52 (D.C. Cir. 2011) (explaining that under the Prevention of Significant Deterioration program, a permit applicant may not rely on a SIP that had not yet been amended to conform with the Act's requirements because 42 U.S.C. § 7475(a) "forbids the construction of such facilities absent a PSD permit meeting the requirements of the Clean Air Act"). No comparable direct regulation of sources exists under the Act's Nonattainment New Source Review program. Instead, as explained above, stringent air quality controls such as "lowest achievable emission rate," 42 U.S.C. § 7503(a)(2), and "offsets," *id.* § 7503(c)(1), are applicable to and enforceable against sources only through SIPs that have been approved by EPA.

Thus, even if Sierra Club prevailed and obtained an order directing EPA to replace the challenged regulation with a regulation requiring SIPs to cover more sources, nothing would change with respect to permits issued before the amendment of the SIP, including the permit that Energy Answers has already received from the Puerto Rico Environmental Quality Board. *See supra* p. 19. Although vacating EPA's regulation could eventually lead to a revision in the Puerto Rico SIP to broaden its

coverage in the manner preferred by Sierra Club -- i.e., to apply lowest achievable emissions rate, offsets, and other requirements associated with Nonattainment New Source Review permits to emissions of any pollutant, whether major or minor, from a new or modified major stationary source -- any such revision would have only prospective effect. So long as Energy Answers does not, going forward, alter its plans and trigger Nonattainment New Source review anew -- a speculative future event[13] -- the company is entitled to rely on the permit issued by the Puerto Rico Environmental Quality Board and the determination reflected therein, i.e., that Energy Answers' lead emissions do not require a Nonattainment New Source Review permit under the EPA-approved Puerto Rico SIP then in effect. *See General Motors*, 496 U.S. at 540-41 ("[T]he approved SIP is the applicable implementation plan during the time a SIP revision proposal is pending.") (citations omitted).

Accordingly, because even a decision in Sierra Club's favor would not redress its claimed injury, Sierra Club lacks standing.

II. Sierra Club's Petition is Statutorily Time-Barred.

Sierra Club fails to establish jurisdiction not only under Article III but also under the Act. "Section 307(b)(1) of the Clean Air Act sets a 60-day period for challenges to EPA regulations, with a renewed 60-day period available based on the

[13] Speculative future harm does not establish standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("injury in fact . . . is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.") (citations and quotation marks omitted).

occurrence of after-arising grounds." *Am. Road & Transp. Builders Ass'n v. EPA*, 705 F.3d 453, 456 (D.C. Cir. 2013). Outside of those 60-day periods, the Court is "powerless" to address the petition. *See Med. Waste Inst. & Energy Recovery Council v. EPA*, 645 F.3d 420, 427 (D.C. Cir. 2011) ("The filing period in the Clean Air Act 'is jurisdictional in nature'; if the petitioners have failed to comply with it, [the courts] are powerless to address their claim.") (citation omitted). Here, the flaws in Sierra Club's jurisdictional arguments are many.

A. Congress intended that judicial review of regulations promulgated under the Act be sought promptly.

In contrast to Sierra Club's casual treatment of the jurisdictional deadlines set forth in the Act, Congress has made clear -- repeatedly -- the importance it places on quickly resolving challenges to EPA regulations implementing the Act.

As amended in 1970, the Act's judicial review provisions required petitions for review to be brought within 30 days. The purpose of the 30-day limit was "to maintain the integrity of the time sequences provided throughout the Act." S. Rep. No. 1196, 91st Cong., 2d Sess. 41 (1970) ("1970 Senate Report"). The 1970 amendments also provided that a petition for review could be brought after the initial review period if "based solely on grounds arising after such 30th day." Act of Dec. 31, 1970, Pub. L. No. 91-604, § 12(a), 84 Stat. 1708. The legislative history indicates that Congress enacted this provision to account for the possibility that new factual

information would arise suggesting either further regulation is needed or that existing regulations are unnecessary. 1970 Senate Report 41-42.

In 1977, Congress amended this provision to its present form. At that time, Congress extended the review period to 60 days and provided that any petition based "solely" on grounds arising after the initial review period must be filed within 60 days of those grounds arising. 42 U.S.C. § 7607(b)(1). The legislative history emphasized that Congress continued to view this provision as "strictly limit[ing] section 307 challenges to those which are actually filed within that time." H.R. Rep. No. 294, 95 Cong., 1st Sess. 322 (1977). The House Report further explained:

> The only instance in which the committee intends that later challenges may be entertained by the court of appeals are those in which the grounds arise solely after the 60th day. Thus, unless a petitioner can show that the basis for his challenge did not exist or was not reasonably to be anticipated before the expiration of 60 days, the court of appeals is without jurisdiction to consider a petition filed later than 60 days after the publication of the promulgated rule.

Id.

In addition to addressing after-arising grounds while strictly limiting the time to file judicial challenges to regulations and other final agency action, Congress addressed the subject in the context of presenting new information to EPA. Section 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B), sets forth an exhaustion requirement, i.e., a rule that only reasonably specific objections noted during the public comment period may be raised on judicial review. But with respect to raising alleged after-arising grounds to EPA, Congress provided an exception to that rule:

> If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or *if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review)* and if such objection is of *central relevance* to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded *had the information been available* at the time the rule was proposed.

42 U.S.C. § 7607(d)(7)(B) (emphasis added). That exception further demonstrates that Congress regarded after-arising grounds as narrow and linked with consequential new information.

Also in 1977, Congress amended the Act to establish another consequence for failing to promptly challenge EPA action. Section 307(b)(2) provides that any issue that could have been raised in a petition for review cannot be used as a defense to a civil or criminal enforcement action. 42 U.S.C. § 7607(b)(2).

B. This Court has repeatedly enforced the Act's narrow window for petitioning for review of regulations.

Although the Act does not expressly define "grounds after arising," this Court construes the phrase far more narrowly than Sierra Club does here. In *Nat'l Mining Ass'n v. Dep't of Interior*, 70 F.3d 1345 (D.C. Cir. 1995), the Court rejected a claimant's attempt to challenge the validity of an old regulation promulgated under the Surface Mining Control and Reclamation Act. Addressing that Act's after-arising grounds provision -- which the Court noted is "similar" to section 307(b)(1) of the Clean Air Act -- the Court stressed the importance of giving effect to Congress' "careful balance between the need for administrative finality and the need to provide for subsequent

review in the event of unexpected difficulties." 70 F.3d at 1350 & 1350 n.2. Moreover, in dismissing the challenge as time-barred, the Court held that "[p]ermitting review of [the] petition based on grounds clearly available within 60 days of the rule's promulgation would thwart Congress' well-laid plan." 70 F.3d at 1350. Because the claimant's argument that the regulation was *ultra vires* or impermissible under *Chevron* was available at the time of promulgation, no after-arising grounds existed.

Similarly, in *Am. Road*, the Court dismissed a belated challenge to an old regulation promulgated under the Clean Air Act. 705 F.3d at 456-58. The Court rejected the petitioner's contention that EPA's recent application of that regulation constituted after-arising grounds, reasoning: "There would be no pressure to challenge regulations within the 60-day period after their promulgation if any petitioner could simply wait to test the substance of those regulations once EPA applies them, for example, in an approval of a state SIP revision -- as [the petitioner] has attempted to do here." 705 F.3d at 458. The Court's reasoning encompasses other examples, such as the application of a regulation to a permit proceeding. Any such application would not provide grounds to "test the substance" of that regulation. *See infra* p. 39 n.18.

This Court's decision in *Coalition* involved the application of the principle, also noted in *Am. Road*, that "the occurrence of an event that ripens a claim constitutes an after-arising ground." 705 F.3d at 457 (citation omitted); *Coalition*, 684 F.3d at 129-30

(same). In *Coalition*, this Court allowed two industrial organizations to challenge old regulations promulgated under the Act's Prevention of Significant Deterioration program where a new regulation -- the asserted after-arising ground -- had the effect of subjecting those organizations' members, for the first time, to the old regulations' requirements. *See* 684 F.3d at 130. Before the new regulation existed, the Court reasoned, any alleged injury to those organizations' members from the old regulations was speculative and therefore the new regulation ripened the organizations' claim.[14] Here, by contrast, there is no new regulation or other consequential event to ripen any claim (as discussed *infra* pp. 33 to 34).

In a cogent decision issued after *Coalition*, the Tenth Circuit generally defined an after-arising ground as "a sufficient *legal* basis for granting the relief sought." *Utah ex rel. Utah Dep't of Environmental Quality, Div. of Air Quality v. EPA*, 750 F.3d 1182, 1184 (10th Cir. 2014) (quoting *Sanders v. United States*, 373 U.S. 1, 16 (1963)) (emphasis

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[14] Another example of claimants establishing jurisdiction to challenge an old regulation in light of an after-arising significant development is *Honeywell Int'l, Inc. v. EPA*, 705 F.3d 470 (D.C. Cir. 2013). There, certain participants in an Act cap-and-trade program sought review of EPA's approval of pollutant transfers after this Court issued a decision, *Arkema Inc. v. EPA*, 618 F.3d 1 (D.C. Cir. 2010), involving that same approval decision. Rejecting EPA's position, *Arkema* held that certain pollutant transfers were "permanent," a term of art under the program. This Court in *Honeywell* concluded that *Arkema* had "changed the legal landscape" as it applied to participants in the cap-and-trade program and effectively altered the terms of EPA's approval, and that the petitioner in *Honeywell* "could not have raised its merits argument until [the Court's] decision in *Arkema*." *Honeywell*, 705 F.3d at 473. In that context, *Arkema* constituted after-arising grounds for participants in the program to challenge EPA's approval.

added). That understanding squares with congressional intent and this Court's precedent, which disfavor a tardy attack on an old regulation based on nothing more than a contention that the old regulation is *ultra vires*, impermissible under *Chevron*, or a similar argument available at the time of promulgation.

C. Under a correct reading of the Act and the Court's precedent, Sierra Club's petition is time-barred.

Under a faithful reading of the Act, congressional intent, and precedent, Sierra Club may not raise a facial challenge to 40 C.F.R. § 51.165(a)(2)(i) decades after its promulgation based on a statutory construction argument that was available in 1980 and, in fact, is similar to an argument raised by a commenter during the rulemaking process. *See supra* pp. 9-10. Moreover, it is irrelevant under 42 U.S.C. § 7607(b)(1) whether every single one of the petitioning organizations existed at the time of the old regulation's promulgation or whether any of the petitioning organizations has acquired new members since the old regulation's promulgation. Rather, it is the *general* availability of the current argument at the time of the old regulation that matters in determining whether an alleged after-arising ground is cognizable. As in *Nat'l Mining*, "[p]ermitting review of [the] petition based on grounds clearly available within 60 days of the rule's promulgation would thwart Congress' well-laid plan." 70 F.3d at 1350.

Coalition, at bottom, involved *sui generis* after-arising grounds that are not present here. Those petitioners challenged old regulations that, for the first time, had far broader effect due to a new regulation. Indeed, Sierra Club acknowledges that the

new regulation at issue in *Coalition* (i.e., the after-arising ground there) brought about a "transformation of [the Prevention of Significant Deterioration] program[.]" Sierra Club Br. 43.[15] Here, in contrast to the petitioners in *Coalition*, Sierra Club does not point to any new action by EPA that changed anything about, or had any bearing on, the scope of 40 C.F.R. § 51.165(a)(2)(i). The only new action Sierra Club cites, the Prevention of Significant Deterioration permit, had no impact -- much less a transformative effect -- on the challenged regulation (as discussed further in the section below).

D. Even under a broader reading of the Act and the Court's precedent, Sierra Club's challenge is untimely.

Even under a broader reading of the Act and *Coalition*, Sierra Club's attempt to establish jurisdiction fails. Sierra Club concedes, as it must, that it did not file a petition for review of the challenged regulation promptly after notice of its promulgation appeared in the Federal Register in 1980. *See* Sierra Club Br. 19. But Sierra Club argues that "the grounds for [its] challenge arose on May 19, 2014[,]" when "EPA published the notice of the final permit in the Federal Register, for the construction and operation of an incinerator by Energy Answers under the Prevention of Significant Deterioration program." Sierra Club Br. 19 (citing 79 Fed. Reg. 28,710, 28,712 (May 19, 2014) (JA 120, 122)). *See also, e.g.*, Sierra Club Br. 25

[15] But Sierra Club is incorrect that such transformation discounts the import of *Utility Air Regulatory Group* (the caption of the case when it reached the Supreme Court) with respect to statutory construction and *Chevron*. *See infra* pp. 41-44.

(Sierra Club's assertion that its "legal challenge became ripe when EPA granted Energy Answers a permit to construct and operate an incinerator"). Sierra Club is wrong.

That alleged after-arising ground, as a matter of law, bears no relation to Sierra Club's merits claim. Sierra Club does not challenge, and seeks no relief whatsoever regarding, Energy Answers' Prevention of Significant Deterioration permit. *See, e.g.*, Sierra Club Br. 25 ("The issue in this case is the validity of an EPA rule . . . ."); *id.* at 60 ("The Court should vacate the rule."). Nor could Sierra Club challenge that permit here; any such challenge can only be heard by the United States Court of Appeals for the First Circuit, which encompasses Puerto Rico. *See supra* 42 U.S.C. § 7607(b)(1) (providing that petitions for review of "locally or regionally applicable" final EPA actions "may be filed *only* in the United States Court of Appeals for the appropriate circuit") (emphasis added).[16]

Moreover, the permit was issued under the Act's Prevention of Significant Deterioration program, whereas the regulation Sierra Club seeks to invalidate governs SIP requirements under the "separate" Nonattainment New Source Review program. Handbook § 4:1. The challenged regulation does not inform any term or condition of

[16] Sierra Club mischaracterizes EPA's motion to dismiss as having argued that "this is only a local matter that belongs in the Circuit Court of Appeals having jurisdiction over Puerto Rico." Sierra Club Br. 28. That argument applied only to the first (of two) parts of Sierra Club's petition for review, which does, on its face, purport to challenge the Prevention of Significant Deterioration permit. *See supra* p. 19 n.10. Sierra Club has since abandoned any challenge to the permit.

the Prevention of Significant Deterioration permit, and the permit is not governed by the challenged regulation. Further, the pollutant of concern to Sierra Club here, lead, is not regulated by the Prevention of Significant Deterioration permit because Energy Answers' incinerator is located in a lead nonattainment area. *See supra* pp. 14-19.

Notwithstanding the separate nature of the Nonattainment New Source Review program and the challenged regulation (on the one hand) and the Prevention of Significant Deterioration program and permit (on the other), Sierra Club, armed with declarations from its members, argues that their challenge to the regulation has factually "ripened because the permit creates a 'substantial probability' of injury to them." Sierra Club Br. 21 (quoting *Coalition*, 684 F.3d at 131). But the record shows that any substantial probability of injury to Sierra Club's members from "lead emissions from the incinerator" occurred well before the Prevention of Significant Deterioration permit. Sierra Club Br. 17.[17]

By late 2011, the relevant portion of Arecibo had been designated a lead nonattainment area. *See* 76 Fed. Reg. 72,097 (Nov. 22, 2011) (JA 117). *All* declarants admit that, by that time, they had learned of Energy Answers' plans and permit applications to construct and operate a pollutant-emitting facility. *See* Decl. of Luisa Margarita Águila Nieves at ¶¶ 5-6; Decl. of Rafael Bey Nazario at ¶¶ 5-6; Decl. of

[17] To the extent that Sierra Club alleges injury from pollutants other than lead, those allegations are irrelevant to its claim. Energy Answers' Prevention of Significant Deterioration permit regulates pollutants other than lead, and Sierra Club does not challenge that permit.

Wilfredo Vélez Hernández at ¶¶ 5-6; Decl. of Jessica Seiglie Quiñones at ¶¶ 5-6; and Decl. of Javier Biaggi Caballero at ¶¶ 6-7.

Further, by at least May 2012, Sierra Club had learned that the facility would emit lead and that such pollutant would *not* be addressed in any Prevention of Significant Deterioration permit. By then, not only had there been a nonattainment area designation impacting the location of Energy Answers' incinerator, but EPA Region 2 had transmitted key information to Sierra Club, including a fact sheet and public notice. *See* EPA Region 2 Letter to Sierra Club de Puerto Rico and enclosed public notice and fact sheet (JA 170-171, 165-167, 176-199); *supra* pp. 16-17. The fact sheet explained, in no uncertain terms, that lead ("Pb") would not be addressed in the Prevention of Significant Deterioration permit. Fact Sheet at 3, 13 n.1, 18 (JA 178, 188, 193). The public notice provided similar information; it listed the pollutants subject to Prevention of Significant Deterioration review, omitted lead from that list, and stated that "[a] separate permit is being issued by the Puerto Rico Environmental Quality Board, to address the other pollutants emitted by this project." Public Notice at 2 (JA 166).

EPA Region 2's public notice also noted the availability of the administrative record. *See* Public Notice at 3 (JA 167). That record included Energy Answers' permit application -- the same application from which Sierra Club cites and quotes in its brief. *See* Sierra Club Br. 3 ("Energy Answers lists potential lead emissions as 0.31 tons/year[.]") (citing Application at 3-4, Table 3-1 (JA 130)). Thus, by May

2012, Sierra Club had access to even more detailed information about projected emissions of lead (and other pollutants) from the incinerator.

That EPA later (i.e., long after May 2012) issued a final Prevention of Significant Deterioration permit is of no moment. As previously explained, the challenged regulation and the permit are independent of one another; with or without the challenged regulation, not a single term or condition of that permit would be different.

Furthermore, Sierra Club confuses after-arising grounds with final agency action. *See* Sierra Club Br. 24 ("If EPA is suggesting that a simple notice of public comment period can trigger the 60-day time period, such a change in the law would increase litigation by forcing petitioners to bring pre-emptive legal actions, just to be safe."). Under the Act, EPA action must be "final" to be reviewable. 42 U.S.C. § 7607(b)(1); *In re: Murray Energy Corp.*, 788 F.3d 330, 334 (D.C. Cir. 2015) ("We may review final agency rules . . . . But we do not have the authority to review proposed rules.") (citations omitted). But the Act does not provide that only final agency action may constitute an after-arising ground. *See* 42 U.S.C. § 7607(b)(1). After-arising grounds may, but need not, be final agency action.

In addition, after May 2012, nothing new that was pertinent to the challenged regulation surfaced. After that date, Sierra Club or its members raised comments to EPA Region 2 about lead and also argued to the Environmental Appeals Board that the regulation was inconsistent with the Act. *See supra* pp. 17-18. Those comments

and arguments were as irrelevant as they were out of place. Neither EPA Region 2 nor any other regional office has a delegation from the Administrator to revise a regulation of nationwide applicability. 42 U.S.C. § 7601(a)(1). Likewise, the Environmental Appeals Board may exercise only the authority expressly delegated to it by regulation or provide assistance specifically requested by the Administrator. 40 C.F.R. § 1.25(e)(2). No regulation grants the Environmental Appeals Board the authority to promulgate or revise regulations promulgated under the Nonattainment New Source Review program. *See* 57 Fed. Reg. 5,320, 5,320-21 (Feb. 13, 1992) (listing matters the Board was empowered to consider at its inception). Further, "[a]s [the Environmental Appeals Board] ha[s] repeatedly stated, permit appeals are not appropriate fora for challenging Agency regulations." *In re Tondu Energy Co.*, 9 E.A.D. 710, 715-16 (2001).[18]

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[18] None of those events matters for purposes of after-arising grounds. *Am. Road* held that while "an agency may reexamine its regulations and thereby initiate a new 60-day period of judicial review," the mere "response to a petitioner's comments cannot provide the sole basis for reopening," 705 F.3d at 457. Under the same reasoning, statements from EPA Region 2 or the Environmental Appeals Board regarding the relationship between the challenged regulation and Energy Answers' facility do not constitute after-arising grounds because they do not alter the scope or effect of that regulation. *See also supra* p. 31.

But even if any of those events could matter for purposes of after-arising grounds, Sierra Club's petition would still be time-barred. It was not filed within 60 days of: (a) EPA Region 2's April 2013 response to comments; (b) EPA Region 2's June 2013 issuance of an initial Prevention of Significant Deterioration permit; or (c) the Environmental Appeals Board's March 2014 decision upholding the initial permit in all relevant respects.

The bottom line is that the record does not support Sierra Club's assertion that "[t]he problem with the EPA rule in the specific context of the Arecibo nonattainment area did not come to light until *recently*." Sierra Club Br. 25 (emphasis added). The record instead establishes that, by May 2012, Sierra Club was aware that Energy Answers' potential to emit lead would not make it, in the words of the challenged regulation, "major for the pollutant for which the area [encompassing Energy Answers' facility] is designated nonattainment." 40 C.F.R. § 51.165(a)(2)(i). Instead of petitioning this Court in July 2012 -- i.e., within 60 days of when Sierra Club faced any substantial probability of injury from 40 C.F.R. § 51.165(a)(2)(i) -- Sierra Club waited to do so until July 2014. Although this filing date fell within 60 days of the Federal Register notice of the final Prevention of Significant Deterioration permit, it was more than *two years* after pertinent facts and any alleged injury "c[a]me to light" regarding the facility's potential to emit lead.

Thus, even under a broad interpretation of what may plausibly constitute an after-arising ground under the Act and precedent, Sierra Club's petition is time-barred.

III. If the Court Reaches the Merits, the Challenged Regulation is Reasonable and Falls within the Bounds of EPA's Statutory Authority.

The challenged 35-year old regulation reflects EPA's interpretation of the Act in the context of the Nonattainment New Source Review permit program. That longstanding regulation is reasonable and entitled to deference under *Chevron* -- even if Sierra Club properly invokes the Court's jurisdiction to review it. The principal

question is whether EPA acted reasonably and thus "stayed within the bounds of its statutory authority." *Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013). The challenged regulation falls well within those bounds.

A. The Supreme Court has made clear that the phrase "any air pollutant" must be interpreted in its regulatory context.

As an initial matter, the Supreme Court's recent decision in *UARG* is highly pertinent to the *Chevron* question presented here. There, the Court examined EPA's interpretation of the phrase "any air pollutant" in the context of preconstruction permitting of greenhouse gas emissions under the Prevention of Significant Deterioration program. *See* 42 U.S.C. § 7479(1) (defining, for purposes of that program, "major emitting facility" to include "stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of *any air pollutant*") (emphasis added). The challenged regulation here similarly involves EPA's interpretation of the phrase "any air pollutant" in the context of preconstruction permitting of pollutants for which an area is designated nonattainment. *See* 42 U.S.C. § 7602(j) (defining, for purposes of the entire Act, "major stationary source" to include "any stationary . . . source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of *any air pollutant*") (emphasis added).

In *UARG*, the Court acknowledged the very regulation at issue here, 40 C.F.R. § 51.165(a)(2)(i), explaining: "The Act requires a permit for the construction or

operation in a nonattainment area of a source with the potential to emit 100 tons per year of 'any air pollutant.' [42 U.S.C.] §§ 7502(c)(5), 7602(j). EPA interprets that provision as limited to pollutants *for which the area is designated nonattainment.* 45 Fed. Reg. 52745 (1980) [(JA 56)], promulgating 40 C.F.R. § 51.18(j)(2), as amended, § 51.165(a)(2)." 134 S. Ct. at 2440 (emphasis by the Court). The Court then characterized that regulation as a "longstanding" example of EPA's ordinary practice of "inferr[ing] from statutory context that a generic reference to air pollutants does not encompass every substance falling within the Act-wide definition." *UARG*, 134 S. Ct. at 2440 & 2442 n.6. Moreover, in light of EPA's ordinary practice as reflected in the challenged regulation (and elsewhere), *UARG* rejected the argument -- very similar to that advanced by Sierra Club here -- that the statutory phrase "any air pollutant" means the same thing each time it appears in the Act.

The specific question presented in *UARG* was whether emissions of greenhouse gases, by themselves, can trigger the need for either a Prevention of Significant Deterioration permit or an operating permit under Title V of the Act. EPA had concluded that they can, an argument that the Court summarized as follows: "Under *Massachusetts* [*v. EPA*, 549 U.S. 497 (2007)], the general, Act-wide definition of 'air pollutant' includes greenhouse gases; the Act requires permits for major emitters of 'any air pollutant'; therefore, the Act requires permits for major emitters of greenhouse gases." *UARG*, 134 S. Ct. at 2439. The Supreme Court rejected that argument as too categorical -- and instead concluded that EPA should have followed

its ordinary practice of construing "any air pollutant" in a manner appropriate to its specific statutory context. *Id.* at 2439-40.

The Court acknowledged that "[i]n *Massachusetts*, [it] held that the Act-wide definition includes greenhouse gases because it is all-encompassing; it 'embraces all airborne compounds of whatever stripe.'" *UARG*, 134 S. Ct. at 2439 (quoting *Massachusetts*, 549 U.S. at 529). The Court also noted that "Congress's profligate use of 'air pollutant' where what is meant is obviously narrower than the Act-wide definition is not conducive to clarity." *UARG*, 134 S. Ct. at 2441. But the Court held that, consistent with *Massachusetts*, EPA must "use . . . statutory context to infer that certain of the Act's provisions use 'air pollutant' to denote not every conceivable airborne substance, but only those that may sensibly be encompassed within the particular regulatory program." *UARG*, 134 S. Ct at 2441. The Court found controlling the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id.* (citations omitted).

In short, *UARG* establishes that the meaning of "any air pollutant," as that phrase appears within the Clean Air Act, depends upon its regulatory context. Sierra Club, by contrast, urges this Court to hold that the Act requires EPA *not* to consider context. Thus, the premise of Sierra Club's *Chevron* step one argument -- that the Act leaves EPA without authority to apply anything but the broadest construction of that statutory phrase -- is without merit. *See UARG*, 134 S. Ct. at 2439 ("Under *Chevron*,

we presume that when an agency-administered statute is ambiguous with respect to what it prescribes, Congress has empowered the agency to resolve the ambiguity.").

B. The challenged regulation is reasonable and entitled to deference under *Chevron* step two.

EPA's interpretation of sections 172(c)(5) and 302(j) of the Act, 42 U.S.C. §§ 7502(c)(5) and 7602(j), as reflected in the longstanding challenged regulation, 40 C.F.R. § 51.165(a)(2)(i), is reasonable and must be upheld under *Chevron* step two. The Act-wide definition of "major stationary source" includes "any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant[.]" 42 U.S.C. § 7602(j). Under *UARG*, that definition must be given a meaning appropriate to the particular regulatory context in which it is used. *See supra* pp. 41-43. The context of the challenged regulation is the Nonattainment New Source Review program and, more specifically, its requirement that SIPs "require permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area[.]" 42 U.S.C. § 7502(c)(5). *See also* 42 U.S.C. § 7503 (setting forth the requirements for Nonattainment New Source Review permit programs). EPA gave effect to that context in interpreting the scope of the Nonattainment New Source Review permit program, i.e., that it applies to "any new major stationary source or major modification that is major for the pollutant for which the area is designated nonattainment." 40 C.F.R. § 51.165(a)(2)(i).

1. EPA reasonably construed Congress' intent.

In promulgating the challenged regulation, EPA construed and sought to effectuate Congress' intent as gleaned from: "the [New Source Review] requirements of section 173," 42 U.S.C. § 7503 (1982); the "offset ruling," 41 Fed. Reg. 55,524 (Dec. 21, 1976) (JA 26), which Congress endorsed and codified, 91 Stat. 745; and the so-called "construction moratorium," 42 U.S.C. §§ 7410(a)(2)(I), 7502(a)(1) (1982). 44 Fed. Reg. at 51,940-41 (JA 47-48). In doing so, EPA "stayed within the bounds of its statutory authority." *Arlington*, 133 S. Ct. at 1868.

In the late 1970s, many areas of the country were not attaining national ambient air quality standards, and Congress took sweeping measures to halt pollution increases until states and territories assumed their primary responsibility for controlling air pollution by adopting implementation plans to provide for attainment. *See Chevron,* 467 U.S. at 848-49; *New England Legal Foundation v. Costle*, 475 F. Supp. 425, 428 (D. Conn. 1979). Those measures included the "construction moratorium," which provided that "no *major stationary source* shall be constructed or modified in any nonattainment area . . . if the emissions from *such facility* will cause or contribute to concentrations of *any pollutant for which a national ambient air quality standard is exceeded in such area,*" unless states and territories produce compliant Nonattainment New Source Review permit programs "*as of the time of application for a permit for such construction or modification*[.]" 42 U.S.C. § 7410(a)(2)(I) (1982) (emphasis added). As is evident, Congress associated the construction moratorium with new or modified major

stationary sources, their permitting, and the particular pollutant or pollutants whose standards were not being met in their location (i.e., the basis for designation of the area as nonattainment).

The plain text of the construction moratorium links the phase "major stationary source" (referenced at the beginning of the provision) with the phrase "concentrations of any pollutant for which a national ambient air quality standard is exceeded" (referenced toward the end of the provision) with a connecting clause: "if the emissions from *such facility* will . . . contribute to." 42 U.S.C. § 7410(a)(2)(I) (1982) (emphasis added). By using the phrase "such facility," Congress intended to qualify "major stationary source" for purposes of the construction moratorium.

In addition, the plain text shows that Congress associated the construction moratorium with the Nonattainment New Source Review permit program. The construction moratorium expressly states, at its ending, that the ban applies "unless, as of the time of application for a permit for such construction or modification, such plan meets the requirements of part D (relating to nonattainment areas)[.]" 42 U.S.C. § 7410(a)(2)(I) (1982). Thus, EPA reasonably interpreted the Act to require Nonattainment New Source Review permit programs to carry the same "major

stationary source" coverage and the same focus on pollutants for which the area is nonattainment as EPA reasonably interpreted the construction moratorium to carry.[19]

The challenged regulation is also supported by EPA's "offset ruling," 41 Fed. Reg. 55,524 (Dec. 21, 1976) (JA 26); *supra* pp. 8-9, a key action that aligned with Congress' intent that "major" refer to a pollutant for which a national ambient air quality standard is exceeded. In that action, taken just before the 1977 amendments to the Act -- which codified the offset ruling and included the construction moratorium -- EPA stated that air quality analyses and action were required "if the [new] source will cause or exacerbate a violation of [national ambient air quality standards]" and, moreover, "only for those pollutants causing the proposed source to be defined as a 'major' source[.]" 41 Fed. Reg. at 55,528 & n.2 (JA 28). Given the widespread air pollution at the time, EPA explained that it would not be effective to focus limited resources on "smaller air pollution sources [that] may individually have an insignificant impact on air quality." *Id.* at 55,525 (JA 27).

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[19] Sierra Club asserts that the construction moratorium "clear[ly]" carried a different meaning; in Sierra Club's view it applied to "any sources that contributed to concentrations of nonattainment pollutants[.]" Sierra Club Br. 57. But such reading gives no effect to the construction moratorium's qualifying clause "emissions from such facility" or to its textual association with the Nonattainment New Source Review permit program. Further, Sierra Club's contention is contrary to principles of *Chevron* deference, which require courts to "presume that when an agency-administered statute is ambiguous with respect to what it prescribes, Congress has empowered the agency to resolve the ambiguity." *UARG*, 134 S. Ct. at 2439. The construction moratorium is, at least, ambiguous and amenable to EPA's construction.

Other provisions of the Nonattainment New Source Review program, both then and now, share a common thread: the Act's programs for nonattainment areas focus on reducing emissions of the pollutant or pollutants for which the area is designated nonattainment. In the 1977 Amendments, Congress specified that SIPs, with respect to nonattainment areas, were to "require permits for the construction and operation of new or modified major stationary sources[.]" 42 U.S.C. § 7502(b)(6) (1982). Congress defined a nonattainment area "for any air pollutant" as "an area which is shown by monitored data or which is calculated by air quality modeling . . . to exceed any national ambient air quality standard for such pollutant[.]" 42 U.S.C. § 7501(2) (1982). The construction moratorium used similar language when referring to nonattainment areas as places where "a national ambient air quality standard is exceeded." 42 U.S.C. § 7410(a)(2)(I) (1982).

Current section 172(c)(3), similar to former section 172(b), requires states and territories to provide an inventory of emissions from "sources of the *relevant* pollutant or pollutants" in nonattainment areas. 42 U.S.C. § 7502(c)(3) (emphasis added); *see also* 42 U.S.C. § 7502(b)(4) (1982) (requiring "plan provisions" to include an inventory of "sources . . . of each such pollutant for each such area"). In addition, section 172(c)(4) of the Act requires states and territories to "quantify the emissions, if any, of any *such* pollutant or pollutants which will be allowed, in accordance with section 7503(a)(1)(B) [], from the construction and operation of major new or modified stationary sources in each such area." 42 U.S.C. § 7502(c)(4).

Section 173(a)(1)(B), 42 U.S.C. § 7503(a)(1)(B), in turn, requires states and territories to have a Nonattainment New Source Review permit program that provides that, if a new or modified major stationary source proposes to locate in an economic development zone within a nonattainment area, any permit must assure that "emissions of *such* pollutant resulting from the proposed new or modified major stationary source will not cause or contribute to emissions levels which exceed the allowance permitted for *such* pollutant for such area[.]" (Emphasis added.) Similarly, former section 172(b)(5), required the quantification of emissions "of any *such* pollutant which will be allowed to result from the construction and operation of major new or modified stationary sources for each such area." 42 U.S.C. § 7502(b)(5) (1982) (emphasis added).

The challenged regulation reflects this common thread by focusing on the pollutant for which the area is designated nonattainment and is thus tethered to the Act.

2. EPA reasonably explained its interpretation.

EPA offered a reasonable explanation in support of the challenged regulation. As explained *supra* pp. 7-9, EPA's September 1979 proposal specifically invoked the Nonattainment New Source Review program, the offset ruling, and the construction moratorium as pertinent to interpreting the Act-wide definition of "major stationary source" in nonattainment areas. *See* 44 Fed. Reg. 51,940-41 (JA 47-48). Although commenters attempted to convince EPA that the proposal either regulated too much

or too little, EPA finalized its proposal in May 1980. *See supra* pp. 9-10 (discussing comments at JA 1-18). "Simplicity" was not the rationale for EPA's interpretation, as Sierra Club asserts (Sierra Club Br. 52). In finalizing its proposal in May 1980, EPA explained that "[a] source may emit many different pollutants" and that "an area may be designated attainment for certain criteria pollutants and nonattainment for other criteria pollutants." 45 Fed. Reg. at 31,309 n.3 (JA 21).[20]

EPA elaborated on its reasoning shortly thereafter, in August 1980. *See* 45 Fed. Reg. at 52,711 (JA 53). EPA explained that the construction moratorium is unique to the Nonattainment New Source Review provisions of the Act, and that no similar statutory text could be found in the Prevention of Significant Deterioration provisions of the Act. *Id.* (JA 53). EPA emphasized that the Prevention of Significant Deterioration program specifically provides for broader pollutant applicability. "Section 165(a)," EPA explained, "subjects a source to review for all regulated pollutants it emits once it is subject to review for one pollutant[.]" 45 Fed. Reg. at 52,711 (JA 53).[21]

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[20] The only reference to "simplicity" EPA made regarded a shorthand phrase that EPA had used. *See id.*; *supra* p. 11.

[21] Contrary to Sierra Club's contention, EPA's rationale did not rely on *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979), which resolved challenges to regulations promulgated under the Act's Prevention of Significant Deterioration program. And nothing in that decision supports expanding the Nonattainment New Source Review program in the manner urged by Sierra Club. *See, e.g., id.* at 368 (rejecting EPA's prior interpretation of PSD as applying beyond the borders of attainment or unclassifiable areas to reach certain sources in nonattainment areas); 40

Cont.

That distinction was as correct then as it is today. Section 165(a)(4) of the Act provides that "[n]o major emitting facility . . . may be constructed in any area to which this part [i.e., part C, the Prevention of Significant Deterioration program] applies unless . . . the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility." 42 U.S.C. § 7475(a)(4). *See also* 42 U.S.C. § 7475(a)(4) (1982) (same). No similar scheme exists within the Nonattainment New Source Review provisions of the Act. The Prevention of Significant Deterioration requirement for best available control technology applies "in any area to which this part [PSD] applies," 42 U.S.C. § 7475(a), but the requirement for lowest achievable emissions rate applies only in "an area which is designated 'nonattainment' with respect to that pollutant." *Id.* § 7501(2). Further, a covered source in an attainment or unclassifiable area must have the best available control technology for any "pollutant subject to regulation under this chapter," 42 U.S.C. § 7475(a), whereas the Nonattainment New Source Review provisions of the Act provide that an EPA-approved SIP "shall require permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area." *Id.* § 7502(c)(5). *See also id.*

C.F.R. § 52.21(i)(2) (EPA's current interpretation of PSD as applying to attainment or unclassifiable areas).

§ 7502(c)(6) (requiring additional control measures as necessary to provide for "attainment of such standard in such area").

Moreover, EPA addressed the suggestion of under-regulation of minor sources in nonattainment areas. Specifically, EPA noted: "sources emitting the nonattainment pollutants in minor amounts are subject to the general [New Source Review] contained in SIPs, and the impacts of such sources are accounted for in demonstrations of reasonable further progress and within the growth allowance provisions of the SIP." 45 Fed. Reg. at 52,713 (JA 55). In other words, EPA's interpretation, embodied at 40 C.F.R. § 51.165(a)(2)(i), implements only "sections 172(c)(5) and 173 of the Act," 42 U.S.C. §§ 7502(c)(5), 7503, which, in turn, reference the "permit requirement" of the Nonattainment New Source Review program.

To alleviate pollution, states and territories may well have to propose and seek EPA's approval to control emissions from minor sources as part of their obligation to make "reasonable further progress" toward attainment. 42 U.S.C. § 7502(c)(2); *see also id.* at § 7501(1) (defining "reasonable further progress" as "such annual incremental reductions in emissions of the relevant air pollutant as are required by this part or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable national ambient air quality standard by the applicable date"); *id.* at § 7503(a)(1)(A)(addressing reductions in allowable emissions "from new or modified sources which are not major emitting facilities" by allowing their use to meet offset requirements). Indeed, here, following the designation of an area within Arecibo as

nonattainment for lead, 76 Fed. Reg. 72,097 (Nov. 22, 2011) (JA 117), Puerto Rico has proposed, for EPA Region 2's review and approval, extra-permit measures targeted at the real cause of the nonattainment problem: the Battery Recycling Facility. *See* EPA Region 2 Letter of Apr. 24, 2015 to Petitioner Madres de Negro de Arecibo (JA 359); *supra* pp. 13-14.

Accordingly, the challenged regulation is supported by the Act and reasonably explained. As such, it is valid and permissible under *Chevron* step two.

CONCLUSION

The motion to dismiss should be granted and the petition for review should be dismissed for lack of jurisdiction. In the alternative, the petition should be denied on the merits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains **13,510 words**, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/Andrew J. Doyle

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2015, I electronically filed the foregoing brief and statutory and regulatory addendum with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

In addition, on the same date, pursuant to D.C. Circuit Rule 31, two copies of the foregoing brief and statutory and regulatory addendum were served via first class U.S. mail, postage prepaid, on each of the following counsel of record for Petitioners and Intervenor, respectively:

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STATUTORY AND REGULATORY ADDENDUM

(separately filed and bound due to its length)

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IN THE UNITED STATES COURT OF APPEALS
FOR THE D.C. CIRCUIT

No. 14-1138

SIERRA CLUB DE PUERTO RICO, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; GINA MCCARTHY, Administrator, United States Environmental Protection Agency,

Respondents.

EPA'S MOTION TO DISMISS PETITION

Respondents United States Environmental Protection Agency and its Administrator (collectively "EPA") move to dismiss the petition for review filed by Sierra Club de Puerto Rico, Ciudadanos en Defensa del Ambiente, Madres de Negro de Arecibo, and Comité Basura Cero Arecibo ("Petitioners"). Part of the petition states that it challenges EPA's "decision granting a Prevention of Significant Deterioration permit to Energy Answers Arecibo, LLC, and the decision of [EPA's] Environmental Appeals Board dated March 25, 2014." Petition for Review, ECF No. 1503791, at 1; *see also* 79 Fed. Reg. 28,710 (May 19, 2014) (notice of permit decision); ECF No. 1508279 (Environmental Appeals Board's decision or "Board Op."). If Petitioners truly intend to challenge these decisions, Petitioners' selection of venue is incorrect. Pursuant to section

307(b)(1) of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. § 7607(b)(1), petitions for review of "locally or regionally applicable" final EPA actions "may be filed *only* in the United States Court of Appeals for the appropriate circuit." (Emphasis added.) Because the permittee is located in Puerto Rico, the appropriate circuit in which to challenge the permit and the administrative appeal thereof is the First Circuit.

The remaining part of the petition takes issue with EPA's "final rule at 45 Fed. Reg. 31,307 (May 13, 1980), as codified at 40 C.F.R. § 51.165(a)(2)(i)." Statement of Issues, ECF No. 1508266, at 1. *See also* Petition for Review at 2. Ordinarily, it would be too late for Petitioners to challenge such a longstanding regulation; section 307(b)(1) of the Act, 42 U.S.C. § 7607(b)(1), sets forth the default rule that "[a]ny petition for review . . . shall be filed within *sixty days* from the date notice of . . . promulgation . . . appears in the Federal Register." (Emphasis added.) Only one exception exists: "[I]f such petition is based solely on grounds arising after such sixtieth day, then any petition for review . . . shall be filed within sixty days after such grounds arise." *Id.*

Petitioners have not met the narrow exception to the default rule. The regulation Petitioners seek to challenge applies in the context of the Act's Nonattainment New Source Review permit program, not its Prevention of Significant Deterioration permit program. Neither EPA's decision to issue a Prevention of Significant Deterioration permit nor the Environmental Appeals

Board's review of that permit implicated the regulation. Thus, Petitioners do not have a newly ripened challenge to 40 C.F.R. § 51.165(a)(2)(i), and this part of their petition is time barred.

These grounds for dismissal are explained in more detail below.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

Under the Clean Air Act ("Act"), "the States and the Federal Government [are] partners in the struggle against air pollution." *General Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). EPA establishes national ambient air quality standards, 42 U.S.C. § 7409, and states, territories, and tribes with qualifying programs seek to achieve those standards by regulating, *inter alia*, the construction and modification of stationary sources of air pollution. 42 U.S.C. § 7410(a)(2)(C). Such regulation occurs through a preconstruction permitting program known as New Source Review, which has three parts. *See* 73 Fed. Reg. 28,321, 28,323-34 (May 16, 2008).

The first part of New Source Review generally requires that any major stationary emission source obtain and comply with a Prevention of Significant Deterioration ("PSD") permit if, following construction, it would emit substantial quantities of a pollutant regulated by the Act. *See* 42 U.S.C. §§ 7475, 7479(1); *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 471 (2004). The applicability of the PSD preconstruction permit program depends on, *inter alia*, the

pollutant in question; i.e., it could apply only if the source is located in an area that has been designated as "attainment" or "unclassifiable" with respect to such pollutant. Attainment areas meet national ambient air quality standards for a given pollutant; unclassifiable areas lack sufficient data to know whether national standards have been satisfied. 42 U.S.C. § 7407(d)(1)(A).

The second part of New Source Review may require a major source to obtain and comply with an additional preconstruction permit if the source is located in a "nonattainment" area, i.e., an area where national standards have not been met for a particular pollutant. 42 U.S.C. § 7407(d)(1)(A); *see New York v. EPA*, 413 F.3d 3, 12-13 (D.C. Cir. 2005). This program is referred to as Nonattainment New Source Review ("NNSR"), and its air quality control requirements are generally more stringent than PSD.[1]

The third part of New Source Review, known as "minor NSR," may apply to the extent that a stationary source would emit a pollutant below specified levels. 76 Fed. Reg. 38,748, 38,752 (July 1, 2011); 45 Fed. Reg. at 52,712.

Because the requirements of these programs are pollutant-specific, a major source may be required to obtain both a PSD and a NNSR preconstruction permit

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[1] For example, the PSD program requires covered sources to operate with "best available control technology," 42 U.S.C. § 7475(a)(4), whereas the NNSR program requires covered sources to meet "lowest achievable emission rate." 42 U.S.C. § 7503(a)(2).

where it proposes to construct in an area that is designated attainment or unclassifiable for some pollutants and non-attainment for others. *See Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 132 (D.C. Cir. 2012), *aff'd in part and rev'd in part on other grounds sub nom., Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014); *Alabama Power Co. v. Costle*, 636 F.2d 323, 350 (D.C. Cir. 1979); 45 Fed. Reg. at 52,711-12. In such an area, the source may also be required to obtain a minor NSR preconstruction permit if its emissions of a particular pollutant are low.

As noted *supra* p. 3, the Act contemplates that states, territories, and tribes will have the primary role in implementing the New Source Review programs. EPA, however, may administer the PSD program where a state lacks an EPA-approved program. 42 U.S.C. § 7410(a)(2)(C) and (c)(1); 40 C.F.R. § 52.21(a)(1). That is the scenario in Puerto Rico, where an EPA regional office, EPA Region 2, issues PSD permits while the Puerto Rico Environmental Quality Board ("EQB") issues separate permits to satisfy applicable NNSR or minor NSR requirements. *See* 40 C.F.R. §§ 52.2722, 52.2723, and 52.2729.

II. FACTUAL AND PROCEDURAL BACKGROUND

Energy Answers Arecibo, LLC ("Energy Answers") proposes to construct a renewable energy facility in Arecibo, Puerto Rico. It applied for a Prevention of Significant Deterioration permit from EPA Region 2. In June 2013, after public notice and comment, EPA Region 2 issued a PSD permit to Energy Answers. The

permit sets forth emission limitations and other requirements of the PSD program with respect to nitrogen oxides, carbon monoxide, sulfur dioxide, and other pollutants for which Arecibo, Puerto Rico is designated "attainment." *See* Board Op. at 55 n.35.

At the initiation of several interested persons, including one or more of the Petitioners, the Environmental Appeals Board reviewed the PSD permit. *See* 40 C.F.R. part 124, subpart A (procedures applicable to administrative appeals of PSD permit decisions). In March 2014, the Board issued a lengthy decision upholding the permit in all relevant respects.[2] EPA Region 2 then issued the final PSD permit in April 2014. *See* 79 Fed. Reg. at 28,711.

In July 2014, Petitioners filed a petition for review in this Court. It begins: "Sierra Club de Puerto Rico, Ciudadanos en Defensa del Ambiente, Madres de Negro de Arecibo, and Comité Basura Cero Arecibo hereby petition the court for review of the U.S. Environmental Protection Agency's decision granting a Prevention of Significant Deterioration permit to Energy Answers Arecibo, LLC, and the decision of the Environmental Appeals Board dated March 25, 2014." Petition for Review at 1.

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[2] The Board remanded the PSD permit to EPA Region 2 for the limited purpose of incorporating into the permit the regulation of biogenic greenhouse gas emissions. EPA Region 2 had requested the remand in light of this Court's decision in *Ctr. for Biological Diversity v. EPA*, 722 F.3d 401 (D.C. Cir. 2013). This issue is unrelated to 40 C.F.R. § 51.165(a)(2)(i).

The petition goes on to cite 40 C.F.R. § 51.165(a)(2)(i), a regulation that is part of the Nonattainment New Source Review program. *See* Petition for Review at 2. Petitioners assert that this regulation -- promulgated by EPA over three decades ago -- "unlawfully limits the preconstruction review program for nonattainment areas under Sections 172(c)(5) and 173 of the Clean Air Act [42 U.S.C. §§ 7502(c)(5) and 7503] to a new major stationary source 'that is major for the pollutant for which the area is designated nonattainment.'" Petition for Review at 2. *See also* Statement of Issues at 1 (reiterating the assertion).

Currently, a different permitting authority, the EQB, is reviewing Energy Answers' expected emissions of lead, a pollutant for which Arecibo is designated nonattainment, *see* 40 C.F.R. § 81.355, as well as minor NSR issues. *See* Board Op. at 27 (noting that the EQB "determines whether applicability thresholds for NNSR permitting are or will be met"). To date, the EQB has not completed its review.

ARGUMENT

I. IF PETITIONERS CHALLENGE THE PREVENTION OF SIGNIFICANT DETERIORATION PERMIT OR THE ADMINISTRATIVE APPEAL THEREOF, THEY ARE IN THE WRONG COURT

Petitioners are in the wrong court with respect to the initial part of their petition that purports to challenge EPA Region 2's permit decision, including the

Board's review of that decision.[3] Any such challenge can only be heard by the United States Court of Appeals for the First Circuit. Section 307(b)(1) of the Act, 42 U.S.C. § 7607(b)(1), provides that petitions for review of "locally or regionally applicable" final EPA actions "may be filed *only* in the United States Court of Appeals for the appropriate circuit." (Emphasis added.) EPA determinations with respect to pollutant emissions from Energy Answers' proposed facility in Puerto Rico are locally or regionally applicable, and are therefore properly reviewable only in the First Circuit (which encompasses Puerto Rico).

Because EPA is lodging this timely objection to Petitioners' erroneous selection of venue, the Court is left with two options: dismissal or transfer. *See Texas Mun. Power Agency v. EPA*, 89 F.3d 858, 867 (D.C. Cir. 1996). Transfer is appropriate "only 'if it is in the interests of justice.'" *Independent Producers Grp. v. Library of Cong.*, No. 13-1132, __ F.3d __, ___, 2014 WL 3674672, at *8 (D.C. Cir. July 25, 2014) (quoting 28 U.S.C. § 1631). EPA is not aware of any such circumstances here. Petitioners should not have had any confusion that the proposed facility is located in Puerto Rico and that the First Circuit is the proper venue.

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[3] Although the petition purports to take issue with the PSD permit and administrative appeal thereof, Petitioners' non-binding statement of issues does not identify any such challenge. *See* ECF No. 1508266.

Accordingly, in the absence of some adequate showing from Petitioners in response to this motion demonstrating that a transfer would serve the interests of justice, their petition should be dismissed insofar as it challenges EPA's Prevention of Significant Deterioration permit and administrative appeal decision.

II. PETITIONERS DO NOT HAVE A NEWLY RIPENED ABILITY TO CHALLENGE A NONATTAINMENT NEW SOURCE REVIEW REGULATION PROMULGATED IN 1980

Petitioners have failed to properly invoke the Court's limited subject matter jurisdiction with respect to their purported challenge to 40 C.F.R. § 51.165(a)(2)(i). As Petitioners acknowledge, EPA promulgated this regulation in 1980. *See* Petition for Review at 2. Under the Clean Air Act, any petition for review of this regulation was due long ago. *See* 42 U.S.C. § 7607(b)(1); *supra* p.2. To qualify for the narrow exception to the Act's short review window, Petitioners must identify a recent "event that ripens a claim." *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 129 (D.C. Cir. 2012), *aff'd in part and rev'd in part on other grounds sub nom., Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014). Both the default rule and its exception are jurisdictional in nature. *See Medical Waste Inst. & Energy Recovery Council v. EPA*, 645 F.3d 420, 427 (D.C. Cir. 2011).

Petitioners have failed to identify a recent event that ripens any challenge to 40 C.F.R. § 51.165(a)(2)(i). Petitioners rely on EPA's issuance of a Prevention of Significant Deterioration permit to Energy Answers and the Board's decision

respecting that permit decision. But these events regard only the Act's PSD program, whereas the regulation Petitioners seek to challenge regards, as Petitioners themselves acknowledge, "the preconstruction review program for *nonattainment* areas[.]" Petition for Review at 2 (emphasis added). Not surprisingly, throughout its 106-page opinion, the Board references this particular regulation only once, and only for the purpose of providing background information on the NNSR permit program. *See* Board Op. at 17 n.8 (stating that 40 C.F.R. § 51.165(a)(2) "set[s] forth the applicability provisions for NNSR programs"). Neither EPA acting as the PSD permitting authority in Puerto Rico nor the Board during its review of the PSD permit had occasion to construe or apply in any substantive way the NNSR regulation Petitioners seek to overturn.[4]

Nor do Petitioners have a newly ripened challenged to 40 C.F.R. § 51.165(a)(2)(i) based on any recent action by the NNSR and minor NSR permitting authority in Puerto Rico, the Puerto Rico Environmental Quality Board. As noted *supra* p.8, a final decision from the EQB regarding Energy Answers' proposed facility remains pending.

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[4] To the contrary, the Board explained that any NNSR issues were beyond the scope of the PSD permit and the Board's review of that permit. *See* Board Op. at 26-28.

CONCLUSION

For the forgoing reasons, the petition for review should be dismissed.

Dated: September 12, 2014

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 14, 2016 Decided March 4, 2016

No. 14-1138

SIERRA CLUB DE PUERTO RICO, ET AL.,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY AND GINA MCCARTHY,
RESPONDENTS

ENERGY ANSWERS ARECIBO, LLC,
INTERVENOR

On Petition for Review of a Final Rule of the
United States Environmental Protection Agency

Christopher D. Ahlers argued the cause for petitioners. With him on the briefs was *Douglas A. Ruley*.

Andrew J. Doyle, Attorney, U.S. Department of Justice, argued the cause for respondents. With him on the briefs were *John C. Cruden*, Assistant Attorney General, *Brian L. Doster* and *Elliott Zenick*, Counsel, U.S. Environmental Protection Agency.

Brendan K. Collins argued the cause and filed the brief for intervenor Energy Answers Arecibo, LLC.

Before: WILKINS, *Circuit Judge*, and EDWARDS and SENTELLE, *Senior Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILKINS.

WILKINS, *Circuit Judge*: There is a lead problem in Arecibo, Puerto Rico, where Intervenor-Respondent, Energy Answers Arecibo LLC, seeks to build a waste incinerator. Energy Answers obtained both federal and state[1] permits for the project as required under the Clean Air Act ("CAA"). Petitioners – three non-profit organizations and an association of residents, collectively referred to here as Sierra Club – do not challenge these permits. Instead, Sierra Club seeks to vacate a 1980 rule promulgated by Respondent Environmental Protection Agency ("EPA"). *See* Requirements for Preparation, Adoption, and Submittal of SIPS; Approval and Promulgation of State Implementation Plans, 45 Fed. Reg. 31,307, 31,312 (May 13, 1980) (codified at 40 C.F.R. § 51.165(a)(2)(i)). The rule implements the CAA's permitting scheme as it relates here to the regulation of the incinerator's lead emissions.

The CAA provides for two permitting programs, which the parties refer to as "Prevention of Significant Deterioration" ("PSD"), *see* 42 U.S.C. § 7470 *et seq.*, and "Nonattainment New Source Review" ("NNSR"), *see id.* § 7501 *et seq.* PSD applies to "attainment" areas – areas that comply with CAA standards for how much of a certain pollutant the air can safely contain. *Id.* § 7407(d)(1)(A)(ii). Because the incinerator will be located in a "nonattainment" area for lead, meaning the amount of lead in the air exceeds

[1] The Clean Air Act defines states to include the Commonwealth of Puerto Rico and other U.S. territories. 42 U.S.C. § 7602(d).

the CAA standard, *id.* § 7407(d)(1)(A)(i), the PSD program does not regulate the plant's lead emissions, *id.* § 7471. NNSR applies instead and contains very strict compliance measures, but is only triggered by pollution sources that emit 100 tons per year or more of the nonattainment pollutant. *Id.* §§ 7502(c)(5), 7602(j); 40 C.F.R. § 51.165(a)(2)(i).

Energy Answers' plant is forecast to emit 0.31 tons per year of lead, so it falls below the 100 ton per year emission threshold that triggers the strict NNSR compliance measures. The crux of Petitioners' claim is that lead is dangerous in very small amounts, and there is already too much of it in the air at the proposed incinerator site. Petitioners argue the regulatory scheme unreasonably creates a loophole for the incinerator, whose lead emissions will make the nonattainment problem worse. Unfortunately for Petitioners, their challenge comes too late. Accordingly, we dismiss Sierra Club's petition as time-barred under 42 U.S.C. § 7607(b)(1).

I.

Under the CAA, the EPA must create National Ambient Air Quality Standards ("NAAQS"). 42 U.S.C. § 7409(a). NAAQS are standards that say the air can safely contain only so much of a particular pollutant. *See Sierra Club v. Jackson*, 648 F.3d 848, 851 (D.C. Cir. 2011). They exist for six pollutants, including the one at issue in our case: lead. *Util. Air Regulatory Grp. v. Envtl. Prot. Agency* (*UARG*), 134 S. Ct. 2427, 2435 (2014).

EPA last revised the NAAQS for lead in 2008 and made them more stringent. As the agency recognizes, lead exerts "a broad array of deleterious effects on multiple organ systems." National Ambient Air Quality Standards for Lead, 73 Fed. Reg. 66,964, 66,975 (Nov. 12, 2008). It gets into our

bloodstream and affects neurological development and function, reproduction and physical development, kidney function, cardiovascular function, and immune function. *Id.* Lead is especially bad for children. The Centers for Disease Control warns there is "no 'safe' threshold" for the amount of lead in the blood levels of young children. *Id.* at 66,972.

In order to achieve and maintain the NAAQS, the CAA requires states to regulate new construction of stationary sources of pollution. They do so through the PSD and NNSR programs, according to which new sources must obtain either PSD or NNSR state permits prior to construction.[2] *See* 42 U.S.C. §§ 7407(a), 7475(a), 7502(c)(5). The new source might have to get one or both types of permits depending on if the source is considered "major," what it emits, and where it is located.

PSD permits are necessary in attainment areas. *Id.* § 7475(a); *Alabama Power Co. v. Costle*, 636 F.2d 323, 365 (D.C. Cir. 1979). The new source, however, must qualify as a "major emitting facility." *Id.* § 7475(a). The PSD program does not use the Act's general definition of "major emitting facility," located at 42 U.S.C. § 7602(j). Instead, a source qualifies under this part of the statute in one of two ways: 1) if it is one of 28 enumerated types of sources with the potential

[2] For the most part, states issue these permits, but in some cases – like in Puerto Rico – the EPA grants them. *See* 40 C.F.R. §§ 52.21 (providing minimum federal standards upon plan disapproval), 52.2729 (indicating Puerto Rico does not meet the PSD requirements and incorporating 40 C.F.R. § 52.21). This is because the EPA must approve all state implementation plans ("SIPs"), 42 U.S.C. § 7410(k)(3), which contain the CAA's minimum PSD and NNSR permitting requirements, *id.* §§ 7471, 7475(a), 7502(c)(5). If a SIP or a portion of it does not meet approval, the agency can step in and administer that part directly. *Id.* § 7410(c)(1).

to emit 100 tons per year or more of "any air pollutant," or; 2) if it is any other stationary source with the potential to emit 250 tons per year or more of any air pollutant. *Id.* § 7479(1). To obtain a PSD permit, the new source must, among other things, install the "best available control technology" ("BACT") for pollutants emitted in significant amounts, *id.* § 7475(a)(4); 40 C.F.R. §§ 51.166(j)(2), 52.21(j)(2).

NNSR permits are required in nonattainment areas. 42 U.S.C. § 7502(c)(5). The new source must also qualify as major, but the NNSR program uses the statute's general definition of "major stationary source." *Id.* §§ 7502(c)(5), 7602(j). The CAA defines "major stationary source" as one with the potential to emit 100 tons per year or more "of *any* air pollutant." *Id.* § 7602(j) (emphasis added). Thus, under the statute, a major source should fall under the NNSR umbrella if it emits 100 tons per year of any pollutant.

The statute is not the end of the story, however, because 40 C.F.R. § 51.165(a)(2)(i) further limits that definition. Under that regulation, the NNSR program "shall apply to any new major stationary source or major modification *that is major for the pollutant for which the area is designated nonattainment*." 40 C.F.R. § 51.165(a)(2)(i) (emphasis added). Because of this rule, promulgated in 1980, the trigger for NNSR permits is whether the source emits 100 tons per year or more of the nonattainment pollutant. *See id*; 42 U.S.C. § 7602(j).

Under the NNSR program, the major source must meet two significant requirements in particular before it can obtain an NNSR permit. It must install technology that will achieve the "lowest achievable emission rate" ("LAER"), 42 U.S.C. § 7503(a)(2), and it must secure emissions "offsets," *id.* § 7503(a)(1)(A). LAER is a more stringent control

technology than BACT, *compare id.* § 7479(3), *with id.* § 7501(3), and an offset is achieved by obtaining emission reductions from preexisting sources to counteract the proposed emissions by the new source, *see id.* § 7503(a)(1)(A).

II.

The EPA administers Puerto Rico's PSD program, *id.* § 7410(c)(1); 40 C.F.R. §§ 52.21, 52.2729, whereas the Commonwealth administers the NNSR program, *see* 40 C.F.R. § 52.2722 (finding Puerto Rico's SIP satisfies Part D of the CAA). Energy Answers applied to the EPA for its PSD permit in early 2011, projecting that the proposed waste incinerator would produce 0.31 tons per year of lead emissions. In November 2011, the EPA designated a part of Arecibo in nonattainment for lead, concluding that a local battery recycling facility was the primary source responsible for this deterioration in air quality.

In May 2012, the EPA announced through a public notice its preliminary determination to approve the PSD permit for the waste incinerator. The notice listed over 12 pollutants that would be subject to BACT under the PSD program. During a lengthy public comment period, the agency received 1,100 written comments, some of which expressed concern about how the nonattainment designation for lead factored into the approval process. The EPA let the community know that the PSD permit did not regulate lead in the nonattainment area, that any pollutants not subject to PSD would be addressed in the NNSR permit issued by Puerto Rico, but that the facility would not emit 100 tons per year of lead in any case and so was not subject to the NNSR requirements.

In June 2013, the EPA issued the final PSD permit decision. The next month, five petitions for review from this decision were filed with the Environmental Appeals Board ("EAB"). The EAB denied the petitions and upheld the permit, except for a limited remand on the issue of biogenic greenhouse gas emissions that does not affect our case. The EAB rejected Petitioners' argument that the PSD permit should regulate lead, because nonattainment pollutants are exempted from PSD regulation, and the authority to administer the NNSR program resides with Puerto Rico.

In December 2014, Puerto Rico issued Energy Answers its NNSR permit. No NNSR restrictions applied to its lead emissions since the plant's potential to emit was projected to be less than 100 tons per year for lead. However, Puerto Rico included a "Minor New Source" permit restricting lead emissions to 0.31 tons per year, consistent with Energy Answers' previous projections. Minor source review is not at issue in our case, but it is another way to impose preconstruction requirements on sources that do not qualify as "major" in the service of attaining and maintaining the NAAQS. *See* DAVID R. WOOLEY & ELIZABETH M. MORSS, CLEAN AIR ACT HANDBOOK: A PRACTICAL GUIDE TO COMPLIANCE 232 (25th ed. 2015) (citing 42 U.S.C. § 7410(a)(2)(C); 40 C.F.R. § 51.160-64).

In July of 2014, Petitioners sought review in our Court of the 1980 rule, alleging that it violated the CAA. The petition also nominally asked for review of the EPA decision granting the PSD permit, and the EAB decision, but did not further elaborate on the permit or permit appeal. The EPA moved to dismiss the case, arguing in part that the petition was time-barred. We referred the case to a merits panel, granted Energy Answers leave to intervene, and now dismiss the petition.

III.

Sierra Club argues that in enacting the 1980 rule, EPA impermissibly interpreted "any air pollutant" in the definition of a major emitting source under the statute, 42 U.S.C. § 7602(j), to mean "the pollutant for which the area is designated nonattainment," 40 C.F.R. § 51.165(a)(2)(i). It believes the agency's reasoning for this limitation first appeared in a footnote, where the EPA noted it was rephrasing the major source requirement "[f]or simplicity." Requirements for Preparation, 45 Fed. Reg. at 31,309 n.3. The EPA admits it did not further elaborate on this interpretation of the CAA when the rule was originally promulgated, though it offered several justifications months later when it relocated the rule to a different part of the Code of Federal Regulations. *See* Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 45 Fed. Reg. 52,676, 52,711 (Aug. 7, 1980). Sierra Club argues the interpretation is nonetheless unlawful and will allow Energy Answers to construct its incinerator free from NNSR permit requirements, which is dangerous because the plant is projected to emit more lead per year than the battery recycling facility that caused the nonattainment problem in the first place.

A.

Before reaching the merits, we must decide if Sierra Club's petition is timely. *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 460 (D.C. Cir. 1998) (describing the time limit pursuant to 42 U.S.C. § 7607(b) as jurisdictional in nature). Under the CAA's judicial review provision, "the Clean Air Act sets a 60-day period for challenges to EPA regulations, with a renewed 60-day period available based on

the occurrence of after-arising grounds."[3] *Am. Rd. & Transp. Builders Ass'n v. Envtl. Prot. Agency* (*ARTBA II*), 705 F.3d 453, 456 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 985 (2014); *accord* 42 U.S.C. § 7607(b)(1). The question for us is what constitutes after-arising grounds, which the statute does not define.

Sierra Club contends that the grounds for its challenge arose on May 19, 2014, when the EPA published notice of Energy Answers' final permit. Its argument almost exclusively relies on *Coalition for Responsible Regulation, Inc. v. Environmental Protection Agency* (*Coalition*), where we explained that the "exception" for after-arising grounds "encompasses the occurrence of an event that ripens a claim." 684 F.3d 102, 129 (D.C. Cir. 2012), *rev'd in part on other grounds sub nom*, *UARG*, 134 S. Ct. 2427. Under Sierra Club's logic, its claim ripened when the EPA granted the PSD permit, and they timely filed for review within 60 days of the permit decision, on July 17, 2014.

We disagree. Sierra Club exaggerates the parallels between *Coalition* and its own petition. The *Coalition* litigation arose after the EPA promulgated the "Tailpipe Rule," which restricted greenhouse gas emissions from cars and light trucks. 684 F.3d at 115. By virtue of this rule, greenhouse gases became a pollutant regulated under the CAA, which triggered other parts of the statute, including

[3] The relevant portion of the text reads: "Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise." 42 U.S.C. § 7607(b)(1).

PSD review. *Id.* (explaining that under PSD, a source becomes a major emitting facility when it emits certain levels of "any air pollutant," meaning any air pollutant regulated under the statute).[4] All of a sudden, major stationary sources were subject to PSD requirements for greenhouse gases.[5] As a result, industry petitioners challenged the PSD permitting triggers within 60 days of the Tailpipe Rule's promulgation. *Id.* at 130. The EPA countered that the challenge was untimely, given that the PSD regulations were promulgated in 1978, 1980, and 2002. *Id.* at 129.

We decided that the Tailpipe Rule "ripened" industry petitioners' challenges because of the substantial probability of injury to them, *i.e.*, their members now had to get PSD permits. *Id.* at 131. A few points were particularly important in reaching this conclusion. First, we acknowledged that petitioners offered a legal argument that was available during the earlier, normal judicial review period, and that their proffered "new ground" was a factual development, but said such circumstances alone "fail[ed] to demonstrate" untimeliness. *Id.* at 130. What really mattered was that if petitioners had challenged EPA's interpretation of the PSD permitting triggers in 1978, 1980, or 2002, their injuries would have been speculative, and we would have lacked jurisdiction under Article III. *Id.* at 131. We were mindful of past case law "assur[ing] petitioners with unripe claims that

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[4] The Supreme Court later rejected the idea that the CAA prevented the EPA from applying a narrower, context-appropriate interpretation of "any air pollutant." *UARG*, 134 S. Ct. at 2442.

[5] Again, the Supreme Court subsequently held EPA exceeded its authority by making new major sources subject to PSD permitting only by virtue of their greenhouse gas emissions, though it upheld BACT requirements for greenhouse gases for sources already subject to PSD review. *See UARG*, 134 S. Ct. at 2447-49.

'they will not be foreclosed from judicial review when the appropriate time comes.'" *Id.* (citing *Grand Canyon Air Tour Coal. v. Fed. Aviation Admin.*, 154 F.3d 455, 473 (D.C. Cir. 1998)).

In addition to *Coalition*, we have determined that petitioners presented after-arising grounds where they could show that a decision by our Court "changed the legal landscape." *Honeywell Int'l, Inc. v. Envtl. Prot. Agency*, 705 F.3d 470, 473 (D.C. Cir. 2013) (explaining that the *Arkema* decision, deeming permanent certain pollutant transfers in a cap-and-trade program, created the premise on which Honeywell's lawsuit was based). On the other hand, we have rejected attempts to manufacture ripeness. We have not been swayed by arguments that the instant parties were not in existence back when the original rule was promulgated. *See Coal River Energy, LLC v. Jewell*, 751 F.3d 659, 662-63 (D.C. Cir. 2014) (construing similar provision under the Surface Mining Control and Reclamation Act). Nor have we been persuaded that "the mere application of a regulation," without anything more, constitutes after-arising grounds. *ARTBA II*, 705 F.3d at 458. If a party could trigger a new 60-day statute of limitations period simply because a regulation was being enforced against it for the first time, our "concerns about preserving the consequences of failing to bring a challenge within 60 days of a regulation's promulgation would be meaningless." *Id.* (quotation marks omitted); *see also Med. Waste Inst. & Energy Recovery Council v. Envtl. Prot. Agency*, 645 F.3d 420, 426-27 (D.C. Cir. 2011) (declining to review an objection raised during the public comment period but not filed within sixty days of the rule).

Simply put, Sierra Club presents us with something closer to the mere application of an old regulation, like in *ARTBA II*, as opposed to a subsequent factual or legal

development creating new legal consequences for petitioners, like in *Coalition* or *Honeywell*. Here, the EPA applied the PSD regulations to Energy Answers' application and issued the PSD permit. Sierra Club's asserted injury did not become any more immediate by virtue of this permit. *See Coalition*, 684 F.3d at 131. We particularly fail to understand how the PSD permit ripened Sierra Club's claim, given that the PSD requirements only apply to attainment pollutants. *See* 42 U.S.C. § 7502(c)(5) (setting forth NNSR permit requirements for new major stationary sources in nonattainment areas). Sierra Club's claim ripened, if at all, following the November 2011 nonattainment designation for lead, when the alleged loophole in the NNSR regulations made it possible for projects like Energy Answers' incinerator to locate in the 4-kilometer nonattainment area while emitting up to 100 tons of lead per year. The PSD permit is beside the point.

***

As Sierra Club does not bring its petition within 60 days of any after-arising grounds, its petition is time-barred under 42 U.S.C. § 7607(b)(1). We have no occasion to evaluate its contention that the EPA improperly narrowed the definition of a major stationary source for the sake of "simplicity" back in 1980. For whatever reason, no one challenged this regulation back then, and Sierra Club cannot do so now. The petition is dismissed.

So ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SIERRA CLUB DE PUERTO RICO, et al., Petitioners, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, et al., Respondents.	Case No. 14-1138

PETITIONERS' RESPONSE TO EPA'S MOTION TO DISMISS

The Sierra Club de Puerto Rico, Madres de Negro de Arecibo, Ciudadanos en Defensa del Ambiente, and Comité Basura Cero Arecibo submit this response to the Environmental Protection Agency's ("EPA's") motion to dismiss.

EPA's motion is based on two false premises. The first false premise is that this appeal is based on issues that are merely local, rather than national in importance. This premise is incorrect because this is an appeal challenging a final rule of EPA, which has national applicability. The second false premise is that the granting of a permit to construct and operate by EPA, whose rule allows Energy Answers to avoid Nonattainment New Source Review, does not create a newly ripened challenge for residents of Arecibo, Puerto Rico. In granting the permit to construct and operate an incinerator, EPA and the Environmental Appeals Board

("EAB") have made a final agency action which has created an injury-in-fact for Petitioners. Accordingly, the Court should hear their challenge to the EPA rule.

I. STATUTORY AND REGULATORY BACKGROUND.

The 1977 Clean Air Act Amendments created the New Source Review program. This is a federal permitting program for new or modified stationary sources constructed after August 7, 1977. There are two parts to this program -- the Prevention of Significant Deterioration program ("PSD") (Sections 160-169B of the Clean Air Act) and the Nonattainment New Source Review program ("NNSR") (Sections 171-179B). 42 U.S.C. §§ 7470-7492, 7501-7509a.

For the PSD program, Section 165(a)(1) requires a permit for the construction of a new source in an air quality control region (AQCR) that is in attainment with any of the national ambient air quality standards (NAAQSs). 42 U.S.C. §7475(a)(1). These are uniform national standards that apply to criteria pollutants, which include coarse particulates (PM_{10}) and fine particulates ($PM_{2.5}$) (collectively, "particulates"), ozone (O_3), nitrogen oxides (NO_x), sulfur dioxide (SO_2), lead (Pb), and carbon monoxide (CO). 40 C.F.R. §50.1 et seq.

For the PSD program, Section 169(1) requires a permit for a "major emitting facility," which includes a new facility with a potential to emit 250 tons per year or more of "any air pollutant." 42 U.S.C. §7479(1). In the case of a listed source, the threshold is lowered to 100 tons per year or more of "any air pollutant." *Id.*

For the NNSR program, Sections 172 and 173 of the Clean Air Act require a permit for the construction of a new "major stationary source" in an air quality control region that is in nonattainment with any national ambient air quality standard. 42 U.S.C. §7502(c)(5) ("Such plan provisions shall require permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area, in accordance with section 7503 of this title."), §7503 (permit requirements).[1] Under Section 302(j), the general definitions section, a facility is a "major stationary source," if it has a potential to emit 100 tons per year or more of "any air pollutant." 42 U.S.C. §7602(j). This threshold applies to all facilities, as there is no distinction between listed and nonlisted sources. *See id.* Other than this lack of a distinction, there is no practical difference between a "major emitting facility" that triggers PSD review and a "major stationary source" that triggers NNSR review. Section 302(j) defines the two terms synonymously. *See id.*

But an EPA rule creates a distinction between a major source for the PSD program and a major source for the NNSR program. For NNSR, EPA only considers whether a facility is a "major stationary source" "for the particular

[1] The cross-reference to "Section 7502(b)(6)" in Section 7503(a) should read "Section 7502(b)(5)." Current Section 7502(b)(5) was originally located at Section 7502(b)(6). *See* Pub. L. 95-95, 91 Stat. 685, 747-48 (August 7, 1977). In the 1990 amendments, Congress moved it to Section 7502(b)(5), but failed to amend this cross-reference. *See* Pub. L. 101-549, 104 Stat. 2399, 2414 (November 15, 1990).

pollutant for which the region is in nonattainment." 45 Fed. Reg. 31,307, 31,312 (May 13, 1980), as codified at 40 C.F.R. §51.165(a)(2)(i). Petitioners challenge this rule.

II. FACTUAL AND PROCEDURAL BACKGROUND.

Petitioners are organizations whose members reside in Arecibo, Puerto Rico. Petitioners are opposed to the construction and operation of an incinerator by Energy Answers in Arecibo, because of a number of environmental impacts, including the release of lead emissions from the facility. Exhibit A, Declaration of Luisa Margarita Águila Nieves (member of Madres de Negro de Arecibo); Exhibit B, Declaration of Rafael Bey Nazario (member of Madres de Negro de Arecibo); Exhibit C, Declaration of Wilfredo Vélez (member of Ciudadanos en Defensa del Ambiente); Exhibit D, Declaration of Jessica Seiglie Quiñones (member of Comité Basura Cero Arecibo). Exhibit E, Declaration of Javier Biaggi Caballero (member of Sierra Club de Puerto Rico).

In 2011, EPA designated a part of the municipality of Arecibo as nonattainment for lead. 76 Fed. Reg. 72,097, 72,119 (November 22, 2011) (final rule, to be codified at 40 C.F.R. §81.355).[2] This designation applies to the "[a]rea bounded by 4 km from the boundaries of the Battery Recycling Company facility." *Id.* EPA and Energy Answers agree that the proposed incinerator will be in this

[2] The island of Puerto Rico is one air quality control region. 40 C.F.R. §81.77.

nonattainment area. *See* Exhibit F, EPA Fact Sheet, PSD Draft Permit, p. 3; Exhibit G, PSD Air Quality Modeling Analysis Amendment, p.2. This means that this part of Arecibo is not in attainment with the national ambient air quality standards for lead. *See* 42 U.S.C. §7407(d)(1)(A). Accordingly, the concentration of lead in the air is not protective of public health, under Section 109(b)(1). 42 U.S.C. §7409(b)(1).

It is the position of Petitioners that Energy Answers may not construct and operate the proposed incinerator, because it is not able to obtain the offsets of lead emissions required under the NNSR Program under Sections 173(a) and 173(c) of the Clean Air Act, 42 U.S.C. §§7503(a),(c). This is because the facility would release more emissions of lead than the battery recycling facility that has caused the lead nonattainment problem. This position is based on the following information. Assuming operation for every hour of the year (8,760 hours), Energy Answers lists potential emissions of lead as 0.31 tons per year, from two boilers each having potential emissions of 0.153 tons per year. *See* Exhibit H, PSD Permit Application, page 3-4, Table 3-1. This is equal to 620 pounds per year.[3] But the facility will actually operate at 95% availability, or 8,322 hours per year. *Id.*, Section 3.1.1, page 3-1. In addition, each boiler will operate between a range of emissions rates, a minimum rate of 0.028 lbs./hr. and a maximum rate of 0.038

[3] 0.31 tons/year x 2,000 pounds/ton = 620 pounds/year.

lbs./hr. *See id.*, Appendix A-Table 2. Therefore, minimum actual emissions from the combined boilers will be 466 pounds per year,[4] and maximum actual emissions from the combined boilers will be 632 pounds per year.[5] These are greater than the actual emissions of lead from the battery recycling facility for each of the years 2007-2013. *See* Exhibit I, EPA Envirofacts Report, Battery Recycling Co., Inc., http://oaspub.epa.gov/enviro/tris_control_v2.tris_print?tris_id=00612BTTRYRD2KM (Toxic Release Inventory data) (highlighting added). Petitioners do not anticipate the company obtaining significant reductions from other sources.

As a municipal incinerator capable of charging more than 50 tons of waste per day, the facility is a listed source, and it is therefore subject to the lower 100 tons per year threshold for review under the PSD program. Board Op. at 17, fn. 8. Under the final permit, the facility has allowable emissions greater than the 100 tons per year threshold, for a number of air pollutants. Exhibit J, Final Permit, page 7 (listing annual emissions limitations of 357 tons per year for carbon monoxide, 352 tons per year for nitrogen oxides, 260 tons per year for sulfur dioxide, 124 tons per year for hydrogen chloride, and 104 tons per year for coarse particulates). Therefore, the potential emissions of a number of air pollutants make it a "major emitting facility" under the PSD program. Data submitted by Energy

[4] 2 boilers x 8,322 hour/year x 0.028 pounds/hour = 466 pounds/year.
[5] 2 boilers x 8,322 hour/year x 0.038 pounds/hour = 632 pounds/year.

Answers in its permit application are consistent with this conclusion. Exhibit H, PSD Permit Application, p. 3-4, Table 3-1.

In 2011, Energy Answers filed its application for a permit to construct and operate an incinerator under the PSD program. EPA is the permitting agency because it has not approved Puerto Rico's authority for this program. Board Op. at 17. In approving Energy Answers' application, EPA asserted that the facility was not subject to NNSR, despite the fact that it will be located in a lead nonattainment area. Exhibit K, EPA Response to Comments, p. 99, Comment 5 ("In addition, Energy Answers is not subject to the nonattainment permit regulations since it would have to emit 100 tons per year of lead. Since the facility will emit less than this major source threshold it is also not subject to nonattainment permit requirements.").[6] This conclusion was based on the EPA rule Petitioners are challenging.

[6] EPA also concluded that the facility is not subject to NNSR because its projected lead emissions of 0.31 tons per year are less than the Significant Emission Rate of 0.6 tons per year. *See* Exhibit K, EPA Response to Comments, pp. 107-108, Comment 2. Although not relevant to this motion to dismiss, it is Petitioners' position that this is incorrect. The Energy Answers facility is a new facility and not a modified facility. Board Op. at 5, 23. For the PSD Program, the Significant Emission Rate limits the applicability of new source review for modified facilities, but not the applicability for new facilities. *See* 40 CFR §51.166(b)(1)(i) (definition of "major stationary source"), §51.166(b)(2)(i) (definition of "major modification"), §51.166(b)(23)(i). The rules are similar for the NNSR program. *See* 40 CFR §51.165(a)(1)(iv)(A) (definition of "major stationary source"), §51.165(a)(1)(v)(A) (definition of "major modification"), §51.165(a)(1)(x)(A).

Following hearings, EPA granted a permit to Energy Answers. Petitioners filed a Petition for Review with the EAB, which included a challenge to EPA's rule. Exhibit L, Petition for Review to EAB, pp. 21-33. On March 25, 2014, the Environmental Appeals Board denied the petition for review, with respect to this challenge. Board Op. at 26-28. On May 19, 2014, EPA published notice of its final agency action granting a final permit to Energy Answers. 79 Fed. Reg. 28,710, 28,712. Within sixty days, Petitioners filed a petition for review in this Court, on July 17, 2014.

Under 40 C.F.R. §51.165(a)(2)(i), EPA limits the preconstruction review program for nonattainment areas to a new major stationary source "that is major for the pollutant for which the area is designated nonattainment." In this appeal, Petitioners assert that EPA's rule is invalid under the two-step test of *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-843 (1984).

Argument

POINT I

BECAUSE PETITIONERS ARE CHALLENGING AN EPA RULE OF NATIONAL APPLICABILITY, THE PROPER VENUE FOR THIS APPEAL IS THE PRESENT COURT, AND NOT THE FIRST CIRCUIT

In asserting that this appeal belongs before the First Circuit, EPA misconstrues the nature of the case. It cites the second sentence of Section 307(b)(1), which provides that petitions for review of "locally or regionally

applicable" final actions of EPA under the Clean Air Act are reviewable in the appropriate circuit. *See* 42 U.S.C. 7607(b)(1). But that rule does not apply here. For an EPA rule of national applicability, the first sentence of Section 307(b)(1) makes the present Court the exclusive forum for judicial review:

> (b) Judicial review
>
> **(1)** ***A petition for review of*** action of the Administrator in promulgating any national primary or secondary ambient air quality standard, ... or ***any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter*** [the Clean Air Act] ***may be filed only in the United States Court of Appeals for the District of Columbia***.

See 42 U.S.C. 7607(b)(1) (emphasis added). It is axiomatic that challenges to EPA rules are made in the present Court. *See e.g., White Stallion Energy Center v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014) (challenge by business and industry to EPA rule for hazardous air pollutants from the utility industry); *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2013) (challenge by business and industry to EPA rule for interstate transport of air pollutants); *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) (challenge by business and industry to EPA rules for greenhouse gases and new source review).

In their petition for review, Petitioners made it clear they are challenging an EPA rule of national applicability:

> This petition seeks judicial review of the nationally applicable final rule of the Environmental Protection Agency entitled *Requirements for Preparation, Adoption, and Submittal of SIPs; Approval and Promulgation of State Implementation Plans*, 45 Fed. Reg. 31,307, 31,312 (May 13, 1980) (to be codified at 40 C.F.R. §51.18(j)), attached as Exhibit 2. This rule is now codified at 40 C.F.R. §51.165(a)(2)(i).

Petition for Review dated July 16, 2014, p. 2. Indeed, if Petitioners had filed this appeal in the First Circuit, EPA would have made a motion to dismiss on the grounds that the appeal belongs before the present Court.

EPA undermines its own argument in a footnote, where it acknowledges that Petitioners have not identified any issues in their Statement of Issues, other than the issue of the validity of the EPA rule. *See* EPA Motion at 8, fn. 3. Contrary to EPA's assertion, Petitioners are in fact taking issue with the PSD permit and the administrative appeal thereof, and they are properly doing this before the present Court. *See id.* While EPA attempts to downplay the role of the issue of the validity of the EPA rule in the proceedings below, Petitioners argued before the EAB that EPA's rule was inconsistent with the statute, and that EPA's interpretation of the Clean Air Act should be rejected. *See* Exhibit L, Petition for Review to EAB, part IV, pp. 21-33. This argument was rejected by the EAB, which spent three pages of its Decision on this issue, which EPA acknowledges in a footnote. *See* Board Op., pp. 26-28. *See* EPA's Motion, p. 10, fn. 4. Now, Petitioners may appeal this issue to the present Court.

Finally, the legal authority cited by EPA for the proposition that local cases belong in the local Circuit, contains an exception for "a determination of nationwide scope or effect," which is exactly the nature of this appeal. *See* 42 U.S.C. 7607(b)(1) (second sentence). Even if the second sentence were to apply, if EPA publishes a determination that an action involves "a determination of nationwide scope or effect," then the appeal must be filed in the present Court. *Id.*[7] Consistent with the spirit of that provision, Petitioners requested that the EAB make a determination whether its decision was "a determination of nationwide scope or effect." Board Op. at 95, fn. 97. In response, the EAB refused to make a determination one way or another, stating that the statute speaks for itself. *Id.* Because the EAB refused to make a determination in response to Petitioners' request, the Court should accept the position of Petitioners that their challenge to the EPA rule is a matter of "nationwide scope or effect," which would make the local Circuit an inappropriate venue.

In any case, Petitioners need not rely on the second sentence of Section 307(b)(1), for this appeal to proceed. Appellate jurisdiction is based on the first sentence of Section 307(b)(1), which requires that all challenges to EPA rules under the Clean Air Act must be made in the present Court.

[7] Petitioners do not concede that a published determination is necessary for finding venue in the present Court.

POINT II

PETITIONERS HAVE ESTABLISHED A FACT-BASED CONTROVERSY THAT CREATES A RIPE CLAIM FOR CHALLENGING EPA'S RULE

1. The appeal is ripe under the Court's decision in *Coalition for Responsible Regulation v. EPA*.

EPA's second false premise is that there is no newly ripened ability to challenge EPA's rule. In general, Section 307(b)(1) of the Clean Air Act requires a party to make a challenge to a rule within sixty days of promulgation of the rule, which would be July 12, 1980 for the final rule being challenged here. *See* 42 U.S.C. §7607(b)(1). But there is an exception to this requirement. A party may make a legal challenge after the statutory sixty day period, "if such petition is based solely on grounds arising after such sixtieth day." *Id.* In such a case, the petition for review "shall be filed within sixty days after such grounds arise." *Id.*

The grounds for Petitioners' challenge arose on May 19, 2014, when EPA published notice of the final permit for the construction and operation of an incinerator by Energy Answers, under the PSD program. The sixty-day period started on May 19, 2014 and ended on July 18, 2014. Petitioners timely filed their petition for review on July 17, 2014. Therefore, they may proceed with the appeal.

This conclusion is consistent with decisions of the Court allowing a party to challenge an agency action beyond the applicable limitations period, based on a new fact-based controversy over the agency action. The Court has long assured

petitioners that they will not be foreclosed from their day in court, when a challenge to an agency action becomes ripe as to them. *See Baltimore Gas & Elec. Co. v. ICC*, 672 F.2d 146, 148 (D.C. Cir. 1982). In that case, the parties had agreed no imminent harm confronted the company as a result of an interpretive order, but the company filed a legal challenge to it during the short 60-day limitations period. *Id.* at 147-48. The Court assured the petitioner it could make a legal challenge, when a fact-based controversy arose. *Id.* ("Because review is not available now, BG&E and other similarly situated shippers will not be barred, if and when a fact-based controversy eventuates, from challenging the Commission's interpretation."). *Accord, Grand Canyon Air Tour Coalition v. FAA,* 154 F.3d 455, 473 (D.C. Cir. 1998) ("“our finding of unripeness gives petitioners the needed assurance” that they will not be foreclosed from judicial review when the appropriate time comes.").

Specifically addressing the exception to the 60-day rule under Section 307(b)(1) of the Clean Air Act, the Court recently held that “[t]he exception encompasses the occurrence of an event that ripens a claim.” *Coalition for Responsible Regulation*, 684 F.3d at 129-130. To satisfy the requirement of ripeness in such a case, an injury-in-fact need only be impending:

> “Ripeness, while often spoken of as a justiciability doctrine distinct from standing, in fact shares the constitutional requirement of standing that an injury in

> fact be certainly impending." *Nat'l Treasury Emp. Union v. United States*, 101 F.3d 1423, 1427 (D.C.Cir.1996).

Id. at 130-131. The Court held that business and industry petitioners could challenge EPA rules regarding the applicability of the PSD program that had been promulgated in 1978, 1980, and 2002, despite the passage of decades of time. *Id.* at 129-132 (Part IV of the opinion). The petitioners included the National Association of Home Builders and the National Oilseed Processors Association, which were now impacted by EPA rules, where they formerly were not. *Id.* at 130-131. Under EPA rules dating back to 1978, they were now subject to a permit requirement for their greenhouse gas emissions under the PSD program, because greenhouse gases were now subject to regulation under the mobile source program of the Clean Air Act. *See id.* Consequently, the Court held they had ripe claims that were validly filed within sixty days of the Tailoring Rule. *Id.* at 131-32.

The Court should reach a similar result here. Just as those business petitioners established an injury-in-fact in being subject to a permit requirement to which they had not previously been subject, Petitioners suffered an injury from EPA's granting of a permit to Energy Answers for the construction and operation of an incinerator whose air emissions will adversely affect them. Exhibits A-E, Petitioners' Declarations.

Petitioners' challenges have ripened because there is a "substantial probability" of injury to them. *Coalition for Responsible Regulation*, 684 F.3d at 131 ("The NAHB and NOPA challenges ceased to be speculative when EPA promulgated the Tailpipe Rule regulating greenhouse gases and their challenges ripened because of the "substantial probability" of injury to them."). According to the statute, the NNSR program requires Energy Answers to obtain offsets against its lead emissions, from other source of lead emissions in this nonattainment area. 42 U.S.C. §§7503(a),(c). It cannot do this because the incinerator will release more lead emissions than those from the battery recycling facility that has caused part of Arecibo to be a lead nonattainment area. *See* pages 5-6, *supra*, Exhibit H, Exhibit I. Because the EPA rule allows the company to avoid NNSR and its offset requirements, Petitioners are equally injured by the EPA rule.

The Court's doctrine allowing for a newly ripened challenge to an agency action is available not only to businesses that are subject to permits, but also to residents who are affected by permits. If a business faces a "substantial probability" of injury when EPA requires it to obtain a permit, then residents opposing a project face a "substantial probability" of injury when EPA grants a permit that affects them. *See Coalition for Responsible Regulation*, 684 F.3d at 131. In either case, there is a ripe, fact-based controversy.

The narrow issue presented in this case--the validity of an EPA rule limiting the air pollutants whose potential to emit may trigger NNSR--only arose after EPA designated part of Arecibo as a nonattainment area and granted Energy Answers a permit to construct and operate an incinerator. As such, the problem with the EPA rule could not possibly have come to light in the context of lead in the specific case of the Arecibo nonattainment area, until recently. Before those events occurred, Petitioners did not have a ripe challenge to the EPA rule. In this unique case, it is important that lead is the only air pollutant for which part of Arecibo is in nonattainment, and that lead tends to be emitted in volumes much less than the 100 tons per year threshold for a "major emitting facility" and a "major stationary source." While the facility's potential to emit lead of approximately 630 lb./year might appear low compared to the "major stationary source" threshold of 100 tons per year, that is irrelevant and immaterial, for several reasons.

First, lead is different from other criteria pollutants. While it tends to be released in low concentrations and small amounts by a few stationary sources (e.g., incinerators and battery recycling facilities, the latter being secondary lead smelters), it is a toxic chemical that causes harm to human health at low levels. In that respect, it is more like mercury, which is a hazardous air pollutant under Section 112 of the Clean Air Act. 42 U.S.C. §7412(b). Indeed, both lead and mercury are considered persistent, bioaccumulative, and toxic (PBT) chemicals

under the reporting program of the Emergency Planning and Community Right-to-Know Act of 1986, subjecting it to more stringent reporting thresholds under that program. 64 Fed. Reg. 58,666 (October 29, 1999) (identifying mercury and mercury compounds as PBT chemicals); 66 Fed. Reg. 4500 (January 17, 2001) (identifying lead and lead compounds as PBT chemicals). It is only for historical reasons, that lead was listed as a criteria pollutant. EPA listed lead as a criteria pollutant under Section 108(a)(1)(B) because it resulted from "numerous or diverse sources" in the 1970s. *See* 42 U.S.C. §7408(a)(1)(B), 42 U.S.C. §7412(b)(7)). Those sources were cars and trucks using leaded gasoline.

Second, the fact there is a lead nonattainment area in Arecibo means that lead emissions already present a danger to public health, even at low amounts. The nonattainment problem was caused by a neighboring battery recycling facility (that is, a secondary lead smelter), whose emissions from 2007 to 2013 have actually been *less than 1 ton per year,* and less than those contemplated by the Energy Answers facility. *See* pages 5-6, *supra*, Exhibit H, Exhibit I. Therefore, existing concentrations in the air are not protective of public health, despite historical emissions of lead that were much less than the "major stationary source" threshold of 100 tons per year. *See* 42 U.S.C. §7409(b)(1).

The fact that Petitioners are injured by both the granting of the permit and by the EPA rule does not make this case less ripe. Rather, they both contribute to the

harm that Petitioners suffer, making this case ripe. The Court should allow the parties to proceed to a briefing on the merits of the challenge to EPA's rule.

2. The Court should reject any additional arguments by EPA.

In a display of circular reasoning, EPA argues that EAB's conclusion that it did not have authority to address the validity of EPA's rule somehow precludes this appeal. *See* EPA's Motion at 10, fn. 4. But EPA may not rely on a conclusion of law in the very decision being appealed, as a basis for making this motion to dismiss. EPA is simply arguing the merits of the issue presented in this appeal. The proper procedure for addressing the validity of the EPA rule is through the submission of briefs on the merits of the case, and not through a motion to dismiss. Moreover, under Section 307(b)(1), the Court has the authority to invalidate and vacate EPA's rule, even if the EAB refused to do so. Finally, if Petitioners had not raised the issue of the validity of the EPA rule before the EAB, EPA would be arguing that Petitioners are barred from raising it on appeal.

EPA's speculation that Petitioners should wait for some ripening action of the Commonwealth permitting agency also fails. *See* EPA's Motion at 10. As discussed above, Petitioners have established a "substantial probability" of injury, making this case ripe. Based on its regulation at 40 C.F.R. §51.165(a)(2)(i), EPA has concluded that the Energy Answers facility is not subject to NNSR, despite the

fact that it is a major stationary source. Exhibit K, EPA Response to Comments, pp. 99, 108. Energy Answers is not expected to file an application for a NNSR permit, where EPA's rule allows it to avoid that program. Moreover, Petitioners' dispute properly lies with EPA, the federal agency that promulgated the rule that Petitioners are challenging, and not with the Commonwealth agency.

It would make even less sense to wait for any *minor* new source review permitting decision of the Commonwealth agency, as EPA suggests. *See id.* The issue in the present appeal involves the validity of an EPA rule for new source review for major sources, not a Commonwealth rule for new source review for non-major sources. It is the position of Petitioners that the facility is a major source for both the PSD program and the NNSR program, and that EPA's rule allowing it to avoid NNSR should be invalidated and vacated.

Denying EPA's motion would serve the interest of efficiency for all parties. The dispute arose from an application for a permit to construct and operate filed with EPA. The appeal properly went to the EAB, and then to this Court. The Clean Air Act requires challenges to EPA rules to be made in this Court. All the interested parties are before the Court. Petitioners consented to Energy Answers' motion to intervene, because it is clearly impacted by Petitioners' challenge to EPA's rule. The Court granted the motion to intervene. ECF No. 1513017. Now it is appropriate to proceed to a briefing schedule on the merits of the case.

EPA's attempt to defer this appeal is inconsistent with Energy Answers' stated interest in an efficient resolution of this dispute, made in its motion to intervene, which the Court granted. ECF No. 1508085, p. 7 ("Permittee also has an interest in the prompt resolution of this appeal," but that "EPA has no interest in the speed with which this matter is resolved."). Noticeably absent from EPA's motion is any meaningful explanation as to why judicial review of this rule should be delayed, or as to what point in the future Petitioners' challenge would be ripe.

Conclusion

Because the Court is the proper venue for this challenge to EPA's rule, and because EPA's granting of a PSD permit creates a newly ripened claim for Petitioners, the Court should deny EPA's motion to dismiss. The Court should proceed with a briefing schedule that allows Petitioners, EPA, and Energy Answers to brief the case on the merits, under F.R.A.P. 28.

Dated: September 25, 2014

Respectfully submitted,

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druley@vermontlaw.edu
Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September, 2014, I have served the foregoing **Petitioners' Response to EPA's Motion to Dismiss** on all registered counsel through the Court's electronic filing system (ECF).

Dated at Williamsville, New York on September 25, 2014.

BY: /s/ Christopher D. Ahlers
Christopher D. Ahlers
8163 Oak Leaf Lane
Williamsville, New York 14221
Tel: (716) 636-4830
chrisahlers@vermontlaw.edu
Counsel for Petitioners

Message

From: matthew.kuryla@bakerbotts.com [matthew.kuryla@bakerbotts.com]
Sent: 11/30/2017 1:51:15 PM
To: Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]
Subject: Re: Delaware

Thanks

Sent from my iPhone

On Nov 30, 2017, at 7:47 AM, Schwab, Justin <Schwab.Justin@epa.gov> wrote:

> Please find attached.
>
> From: matthew.kuryla@bakerbotts.com [mailto:matthew.kuryla@bakerbotts.com]
> Sent: Monday, November 27, 2017 9:18 AM
> To: Schwab, Justin <Schwab.Justin@epa.gov>
> Cc: mark.hamlin@bakerbotts.com
> Subject: Delaware
>
> Justin, was something signed? If so, I'd love a copy. Thanks!
>
> Matt Kuryla
> Partner
>
> Baker Botts L.L.P.
> matthew.kuryla@bakerbotts.com<mailto:matthew.kuryla@bakerbotts.com>
>
> **Ex. 6**
>
> 910 Louisiana Street
> Houston, Texas 77002
> USA
>
> [cid:image001.png@01D189CE.B96BC0D0]<http://www.bakerbotts.com/>
>
> [cid:image002.png@01D189CE.B96BC0D0]<https://www.linkedin.com/company/baker-botts-llp?trk=hb_tab_compy_id_8300> [cid:image003.png@01D189CE.B96BC0D0]
> <https://www.youtube.com/channel/UCgys2C8DwRY-BVN079QNnwQ> [cid:image004.png@01D189CE.B96BC0D0]
> <https://www.facebook.com/BakerBottsLLP/> [cid:image005.png@01D189CE.B96BC0D0]
> <https://www.instagram.com/bakerbotts/> [cid:image007.png@01D189CE.B96BC0D0]
> <https://plus.google.com/u/0/+bakerbotts/about> [cid:image006.png@01D189CE.B96BC0D0]
> <https://twitter.com/bakerbotts>
>
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<image003.png>

<image004.png>

<image005.png>

<image006.png>

<image007.png>

<DE RACT SIP 112217.pdf>

Message

From: Whitfield, Peter C. [peter.whitfield@hoganlovells.com]
Sent: 10/9/2017 3:55:10 PM
To: Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]; Baptist, Erik [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=10fc1b085ee14c6cb61db378356a1eb9-Baptist, Er]
Subject: RE: Connecting

Erik,
We are working on commenting on EPA's supplemental request regarding the 2018/2019 RFS volumes and had a few questions about the type of information EPA is looking for. Any chance you are free for a quick call this week to discuss?
Thanks,
Peter

Peter Whitfield
Senior Associate
Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
Tel: +1 202 637 5600
Ex. 6
Fax: +1 202 637 5910
Email: peter.whitfield@hoganlovells.com

www.hoganlovells.com

-----Original Message-----
From: Schwab, Justin [mailto:Schwab.Justin@epa.gov]
Sent: Thursday, October 05, 2017 8:41 PM
To: Whitfield, Peter C.; Baptist, Erik
Subject: Connecting

Erik - Peter has asked me to connect the two of you. I believe there are matters in your portfolio he would like to discuss. Happy to set up and participate in a call if it would be useful.

Sent from my iPhone

Message

From: debra.jezouit@bakerbotts.com [debra.jezouit@bakerbotts.com]
Sent: 12/6/2017 9:30:34 PM
To: Gunasekara, Mandy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=53d1a3caa8bb4ebab8a2d28ca59b6f45-Gunasekara,]; Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]
CC: cbarlow@entergy.com; kmcque1@entergy.com; megan.berge@bakerbotts.com
Subject: Follow up information from Entergy regarding draft Arkansas Regional Haze SIP
Attachments: EAI Updated FFA for White Bluff 8-18-2017.pdf; EAI Reasonable Progress Analysis 9-27-2017.pdf; AR RH Phase II SIP Presentation to ADEQ 12-1-2017.pdf

Mandy and Justin:

Thank you for taking the time to meet with us today so we could discuss Entergy's concerns with the draft Arkansas Regional Haze SIP. As discussed at the meeting, I am sending you the following three documents:

1. A revised Five-Factor BART Analysis for White Bluff, submitted to ADEQ on August 18, 2017. The document made publicly available by ADEQ had cost and Entergy's proposed cease to use coal date for White Bluff redacted as confidential business information. On December 1, 2017, Entergy released the confidential business information. Attached is the unredacted version of the document.
2. A reasonable progress analysis for Arkansas for the first planning period, submitted to ADEQ on September 27, 2017. The document made publicly available by ADEQ had cost and Entergy's proposed cease to use coal dates for Independence and White Bluff redacted as confidential business information. On December 1, 2017, Entergy released the confidential business information. Attached is the unredacted version of the document.
3. A copy of the presentation that Entergy made to ADEQ on December 1, 2017, to identify Entergy's technical and legal concerns with the draft SIP.

If you have any questions about the attached documents or would like any additional information, please do not hesitate to contact Chuck, Kelly or me. Thank you.

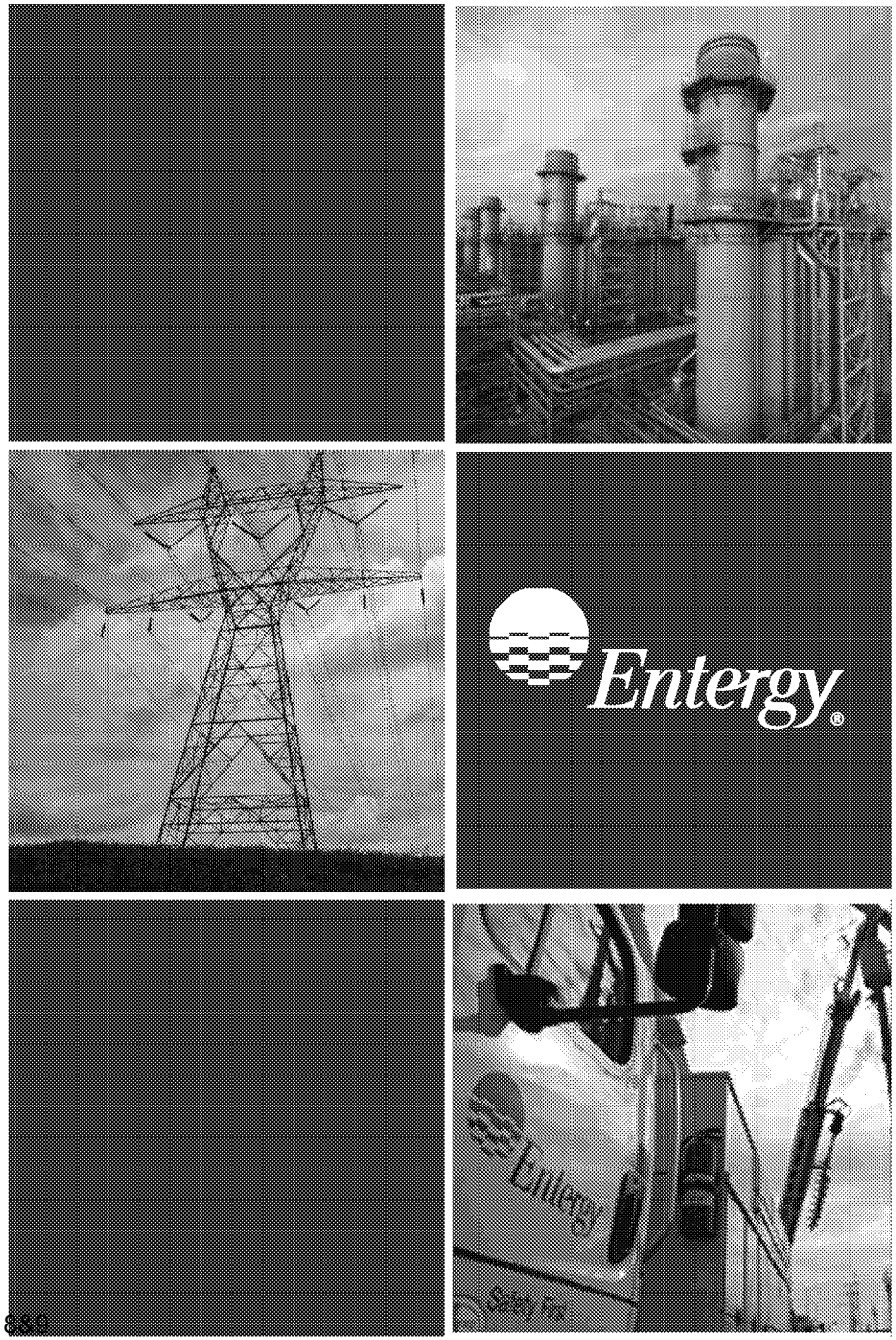
Debra J. Jezouit

Baker Botts L.L.P.
debra.jezouit@bakerbotts.com
Ex. 6
F +1.202.585.1032
Ex. 6

The Warner
1299 Pennsylvania Avenue, NW
Washington, DC 20004

Arkansas Regional Haze Phase II SIP Proposal

Arkansas Department of Environmental Quality
December 1, 2017



WE POWER LIFE℠

Technical Concerns with Proposal

- Concerns with durability of a SIP approval based on errors in ADEQ's analysis of the five statutory BART factors
  - ADEQ must take into account the remaining useful life of the units – proposed SIP disregards Entergy CTUC date and instead delays it

Unit	Control Option	ADEQ Cost Effectiveness* $/ton (2030)	ADEQ Implied Cost Effectiveness** $/ton (2030)
WB1	DFGD	$5,420	$4,599
WB2	DFGD	$5,387	$4,571

* As proposed in SIP

** CTUC in 2030 and amortization start in 2021

CTUC Date Proposed by EAI

- EAI has identified CTUC date of 2028 for both White Bluff units:
  - Comments on Proposed FIP (8/7/15)
  - Petition for Administrative Reconsideration of FIP (11/23/16)
  - Motion to Stay FIP, 8th Circuit (2/8/17)
  - Opening Merits Brief, 8th Circuit (2/17/17)
  - Updated Five-Factor Analysis (provided as CBI) (8/18/17)

Technical Concerns with Proposal

- Proposed SIP conducts an incomplete Q/D analysis and singles out Independence for further evaluation
- Conducting source-specific four-factor analysis is not required for first planning period, is contrary to the state's arguments on the FIP, and could undermine the challenges to the Regional Haze rule revisions
- State may also consider other factors in addition to four factors
  - Not limited to a BART-type analysis
- Entergy's proposed cease-to-use-coal date must be considered in the Long-Term Strategy

Technical Concerns with Proposal

- While a source-specific four-factor analysis is not required, the proposal conducts one for Independence and thus explicitly considers cost-effectiveness of controls
  - Proposed SIP disregards proposed CTUC date submitted by Entergy in September 2017, this suggests a 30-year RUL for the units

Unit	Control Option	EPA Cost Effectiveness* $/ton (2030)	ADEQ Implied Cost Effectiveness $/ton (2051)
IN1	DFGD	$4,252	$2,853
IN2	DFGD	$3,925	$2,634

* Artificially low value based on EPA FIP cost estimates

Technical Concerns with Proposal

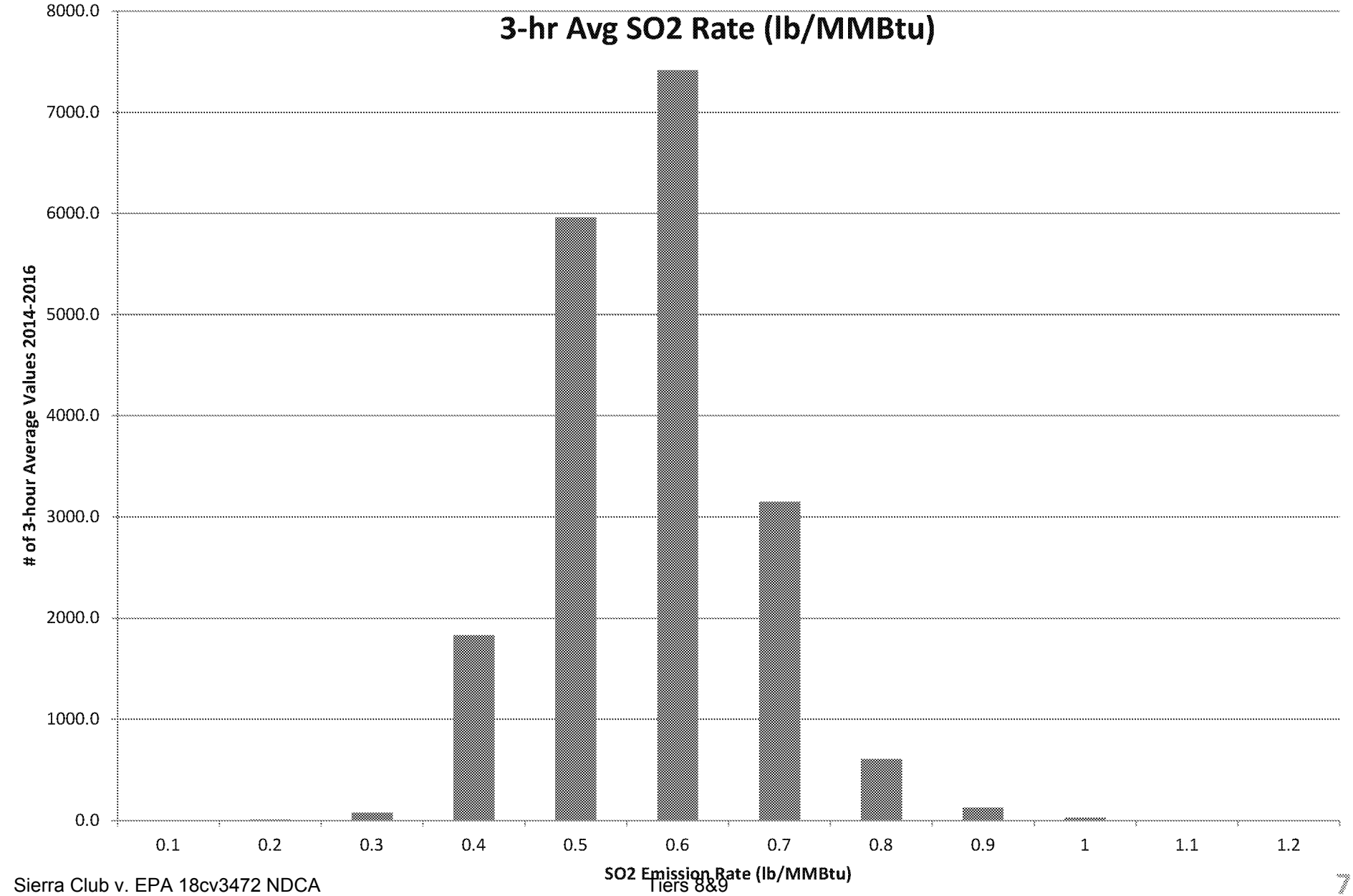
- Proposed SIP compares 30-day average actual SO_2 emission rates to existing 3-hour average permit limits
  - Limits:
    - 1.2 lb/MMBtu (White Bluff)
    - 0.93 lb/MMBtu (Independence)
  - Due to natural variability in coal sulfur content, in order to ensure compliance with applicable short-term (3-hour) limits, Entergy must *necessarily* achieve long-term (e.g. 30-day) average emission rates well below the applicable short-term limit
  - Proposed SIP draws improper conclusions from this comparison of data with significantly differing averaging times
    - Suggests that plant is currently utilizing low-sulfur coal as an existing control, when actual 3-hour average data indicates maximum emission rates approaching limit

Technical Concerns with Proposal

- Example: White Bluff Unit 1
- Data for 2014-2016
- Limit = 1.2 lb SO_2/MMBtu

SO2 Emission Rate (lb/MMBtu)	# of 3-hour Average Values Equal to Given Rate (2014-2016)	Cumulative % of all Values Less than or Equal to Given Rate (2014-2016)
0.1	2.0	0.01%
0.2	8.0	0.05%
0.3	73.0	0.43%
0.4	1829.0	9.96%
0.5	5962.0	41.00%
0.6	7418.0	79.63%
0.7	3151.0	96.04%
0.8	605.0	99.19%
0.9	126.0	99.85%
1	25.0	99.98%
1.1	4.0	100.00%
1.2	0.0	100.00%

Technical Concerns with Proposal



Other Developments

- EPA has published a significant Technical Support Document (TSD) based on revised nationwide CAMx modeling for all Class I areas

- The Sierra Club submitted comments to EPA on the proposed Phase I SIP approval which purportedly show that NOx emissions from White Bluff and Independence contribute to ozone nonattainment in St. Louis

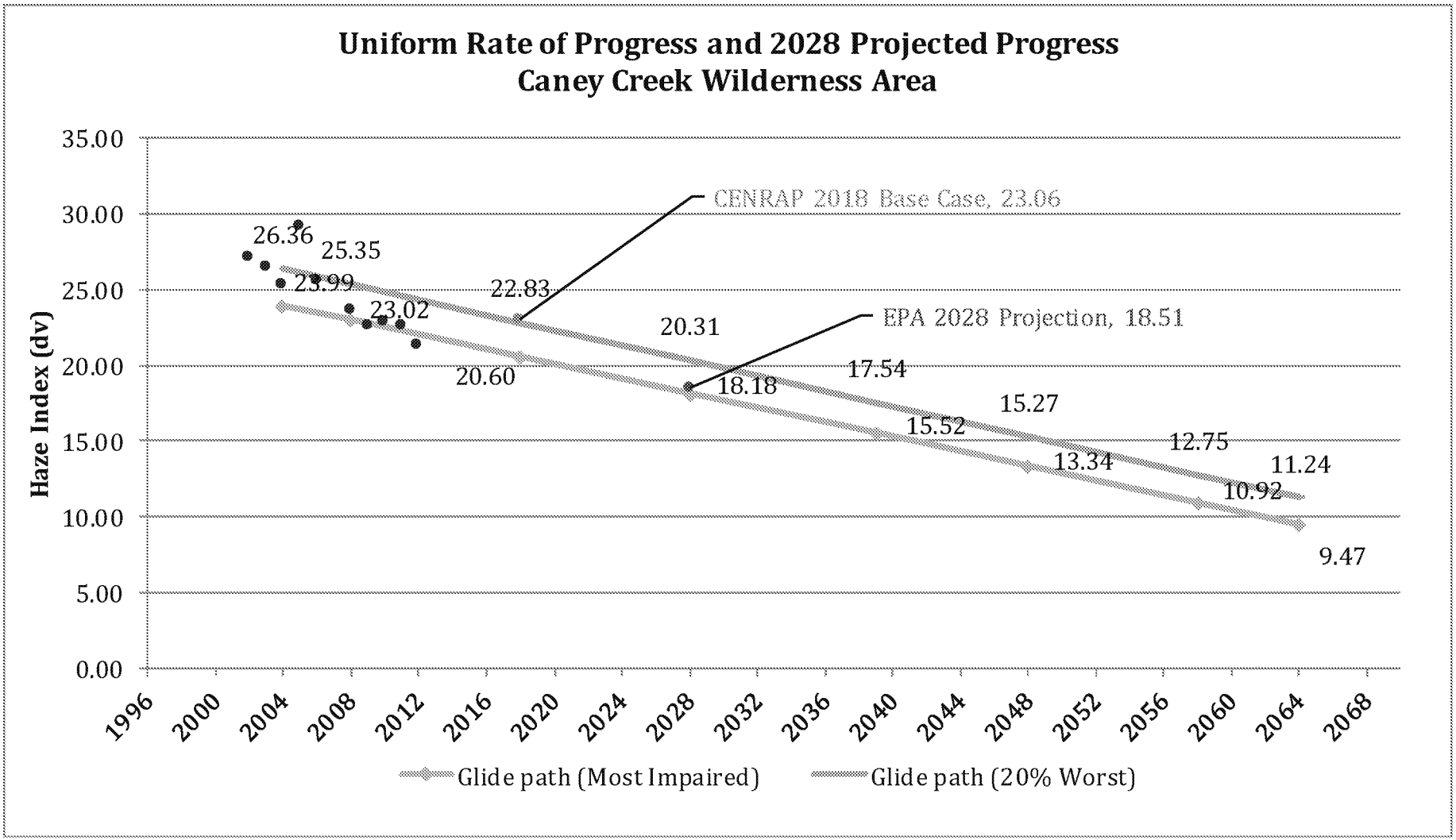
EPA's 2028 Preliminary Modeling

- EPA 2028 Preliminary Modeling
  - EPA conducted preliminary visibility modeling for 2028 (end of second planning period) with intention of informing the regional haze SIP development
  - The modeling predicted 2028 future visibility impairment including domestic anthropogenic, domestic natural, and international anthropogenic and natural sources
  - EPA also conducted source apportionment modeling for multiple source sectors including Biogenic, Fugitive, Agricultural, Marine Vessels, Non-point, On-road and non-road mobile, oil and gas, EGUs, non-EGU point, etc.
- The visibility analysis was conducted using the draft modeling guidance released consistent with the Regional Haze Rule (RHR) revisions, including
  - Use of **most impaired** days vs. the 20% **worst** days in calculation of the predicted 2028 visibility
  - Updates to the glidepath by updating the baseline worst conditions to reflect the 2000-04 most impaired days
  - Updates to the glidepath by updating the 2064 end point to most impaired natural condition

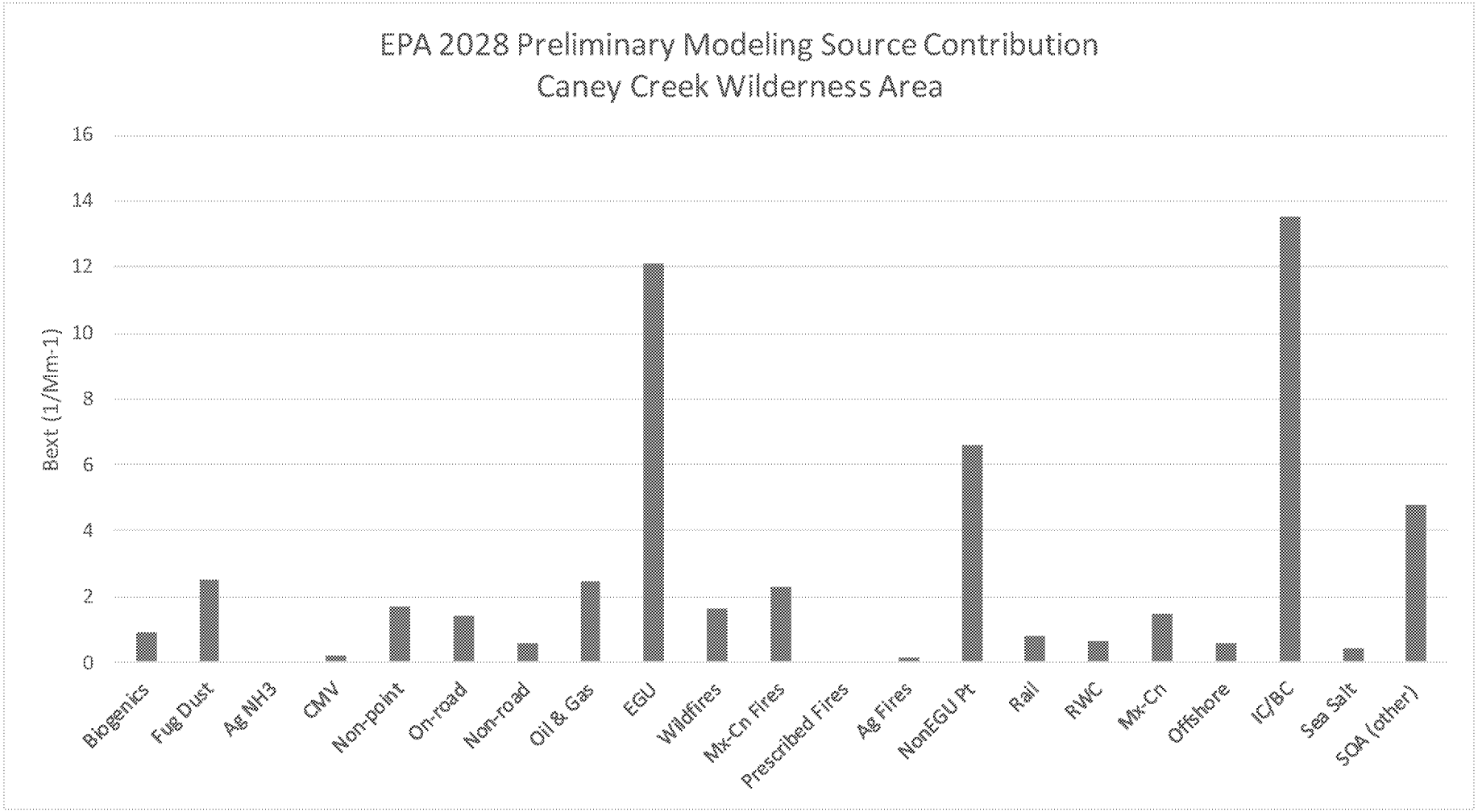
Preliminary Observations

- EPA's modeling predict that the 2028 future visibility impairment at the Caney Creek Wilderness Area and Hercules-Glades will be ***above*** the "updated" glidepath
- The predicted future visibility impairment for the Upper Buffalo Wilderness area and Mingo will be less than one deciview ***below*** the updated glidepath in 2028
- The source contribution analysis indicates that for all Class I areas, Electric Generating Units (EGU) sector was the primary ***anthropogenic*** source contributor followed by non-EGU point source sector
- However, for the Caney Creek and Upper Buffalo wilderness areas, IC\BC was the primary source contributor with contribution significantly higher than the EGU sources

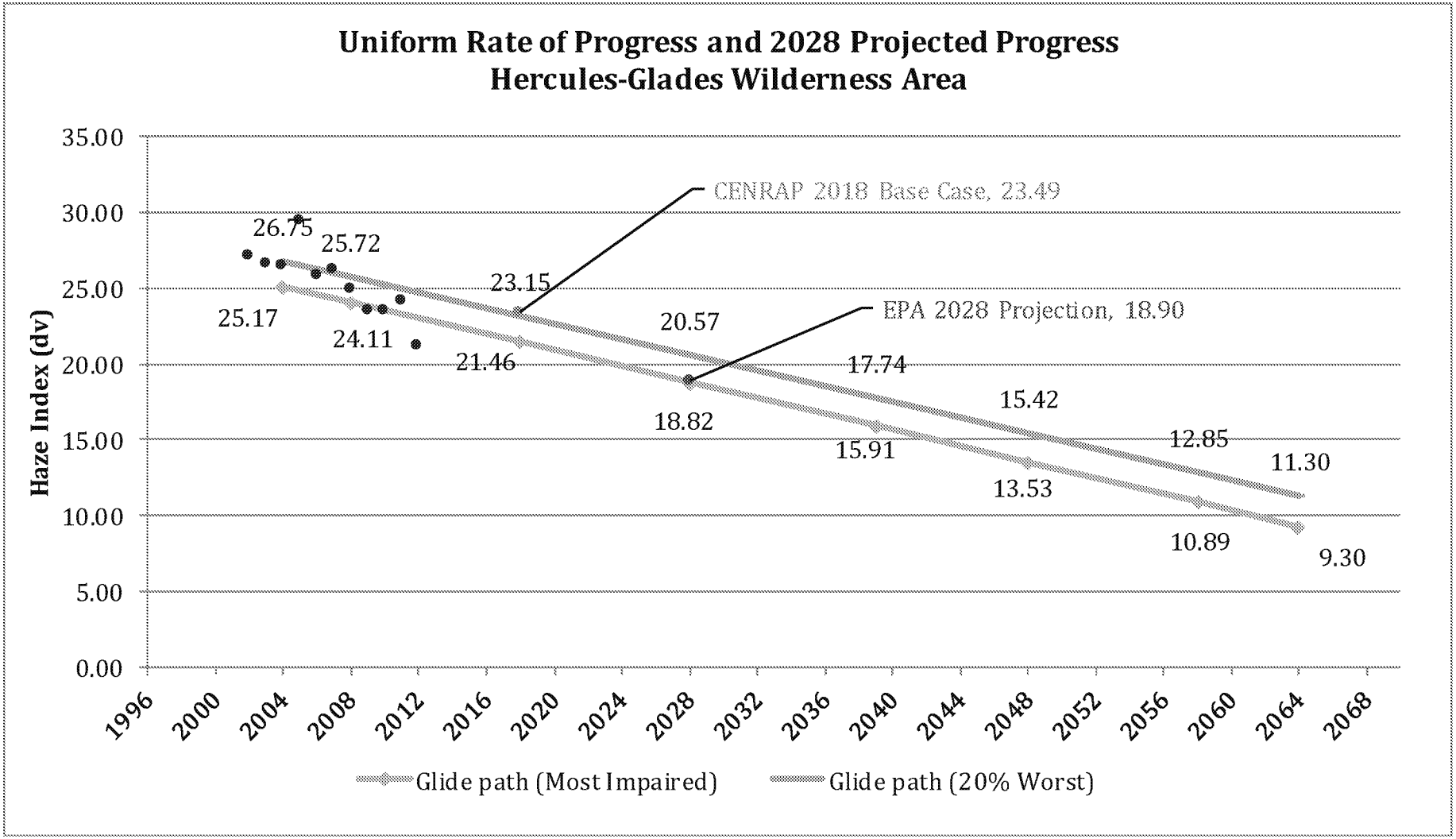
Revised Glidepath for Caney Creek



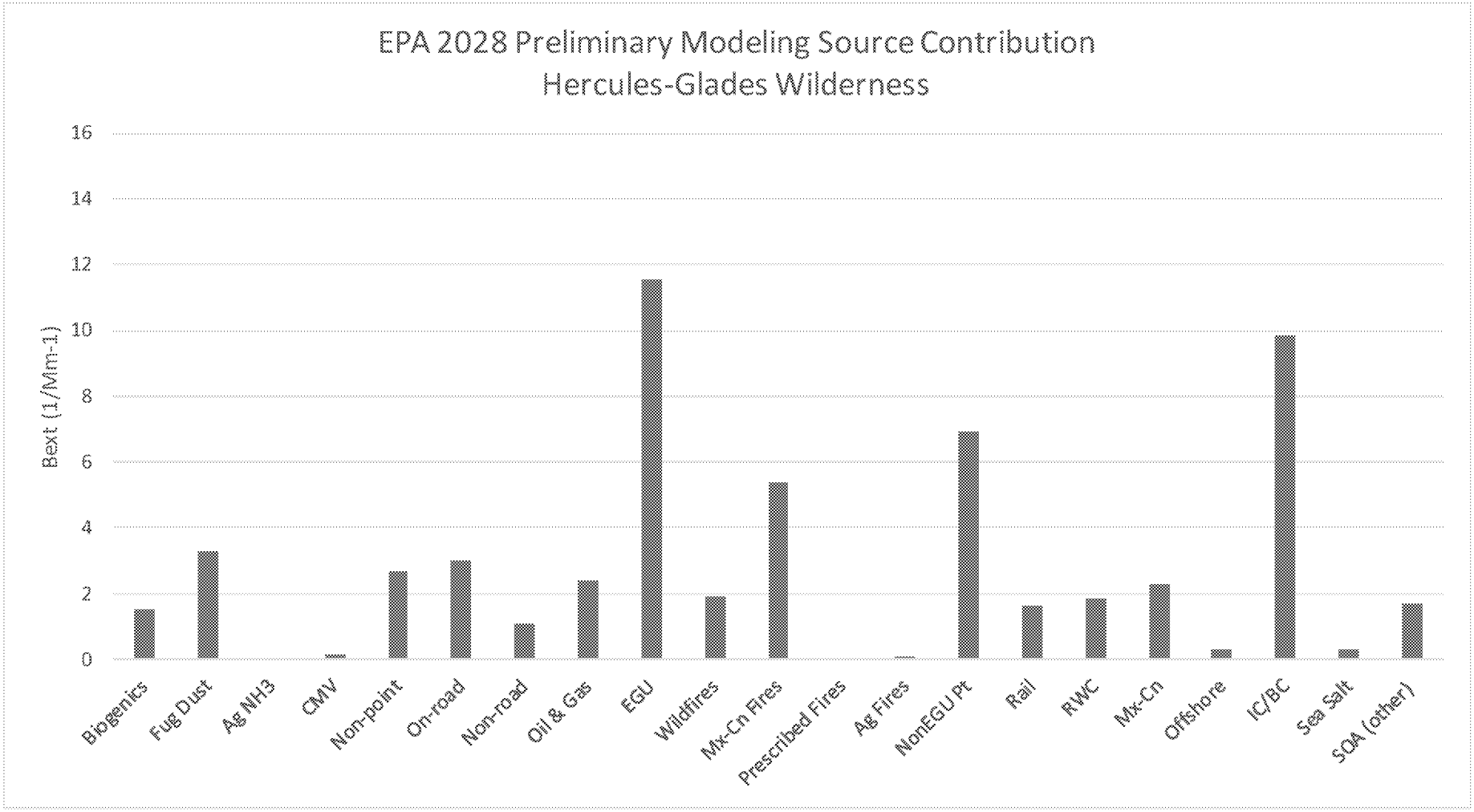
Caney Creek Source Contribution



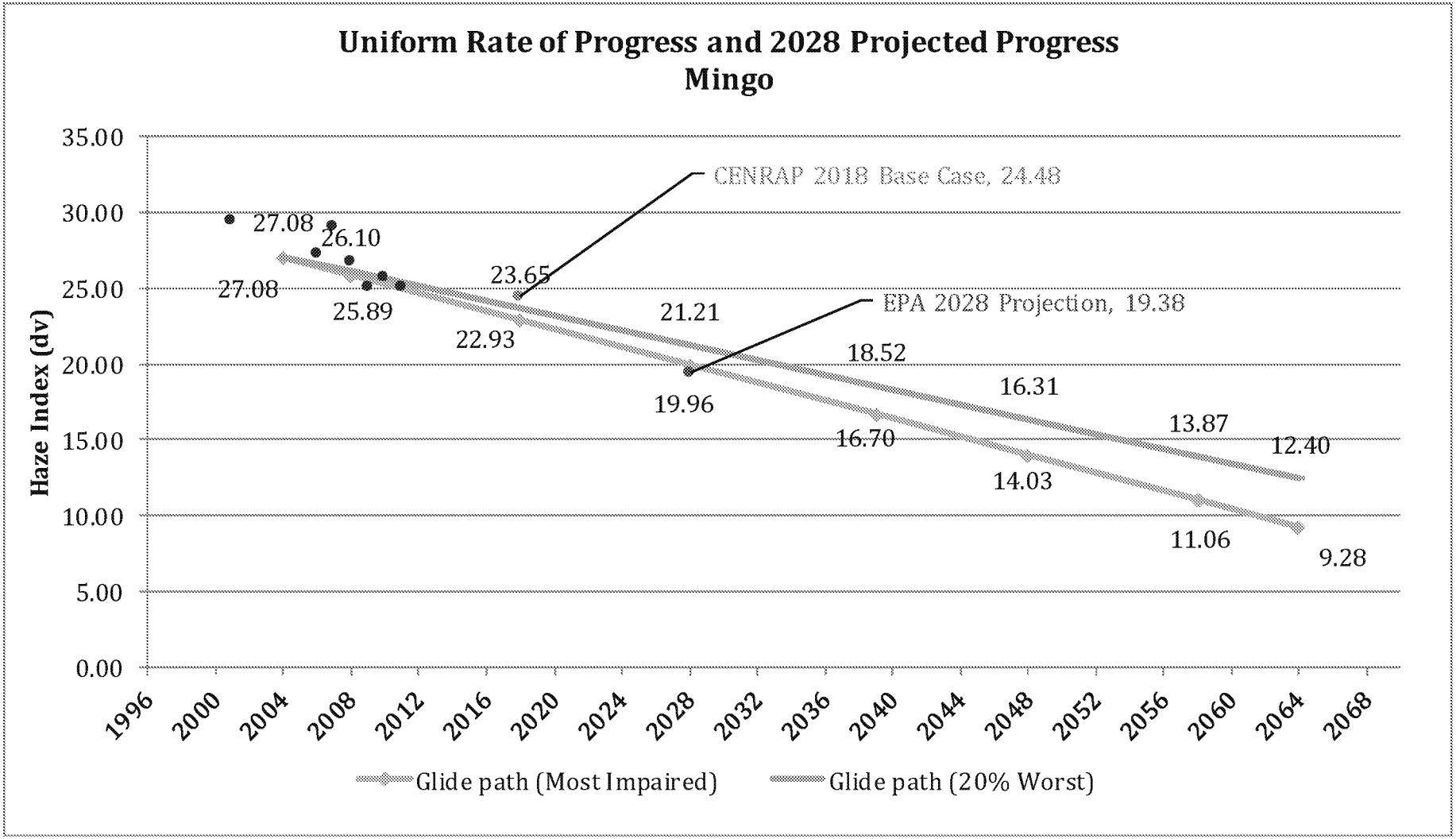
Revised Glidepath for Hercules-Glades



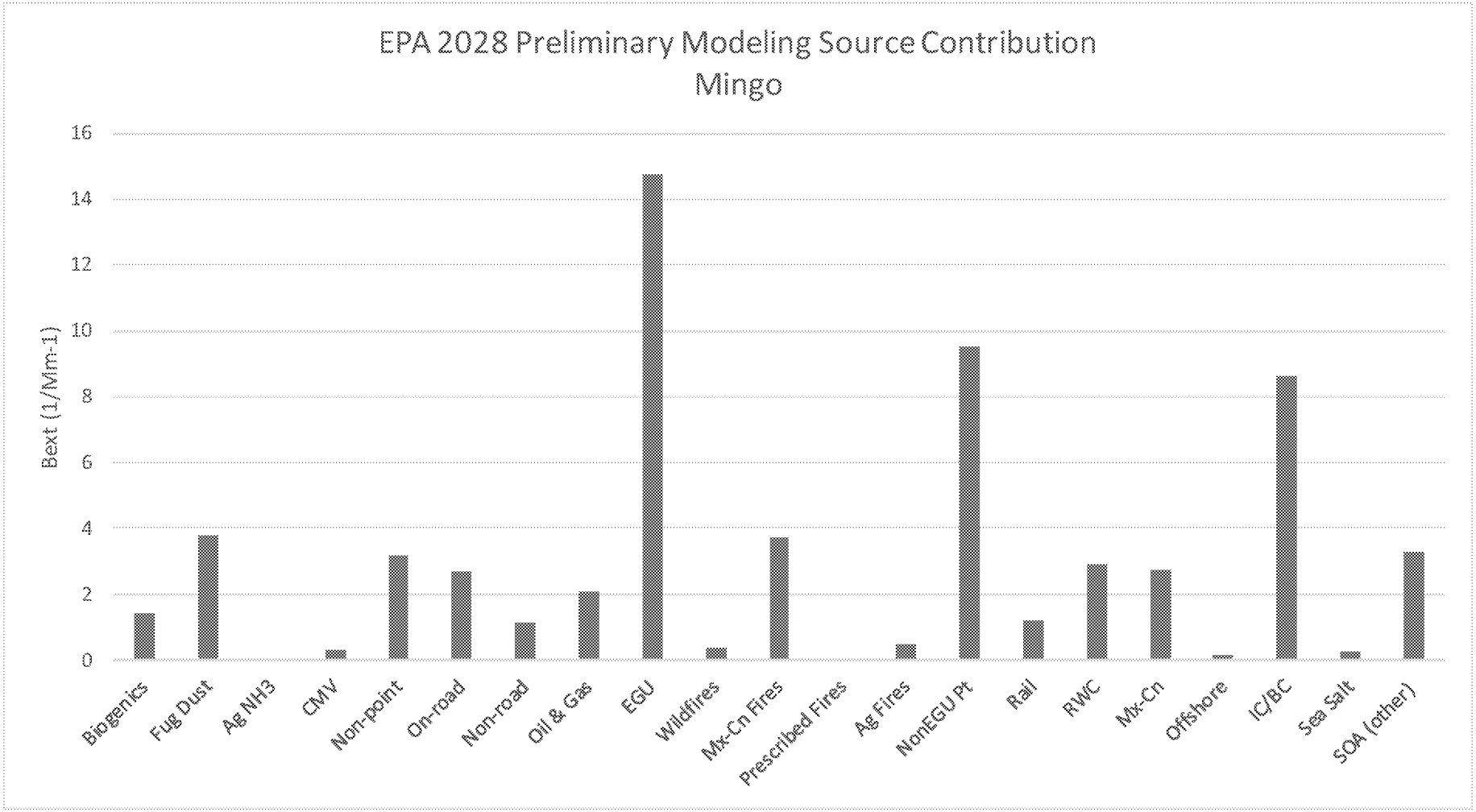
Hercules-Glades Source Contribution



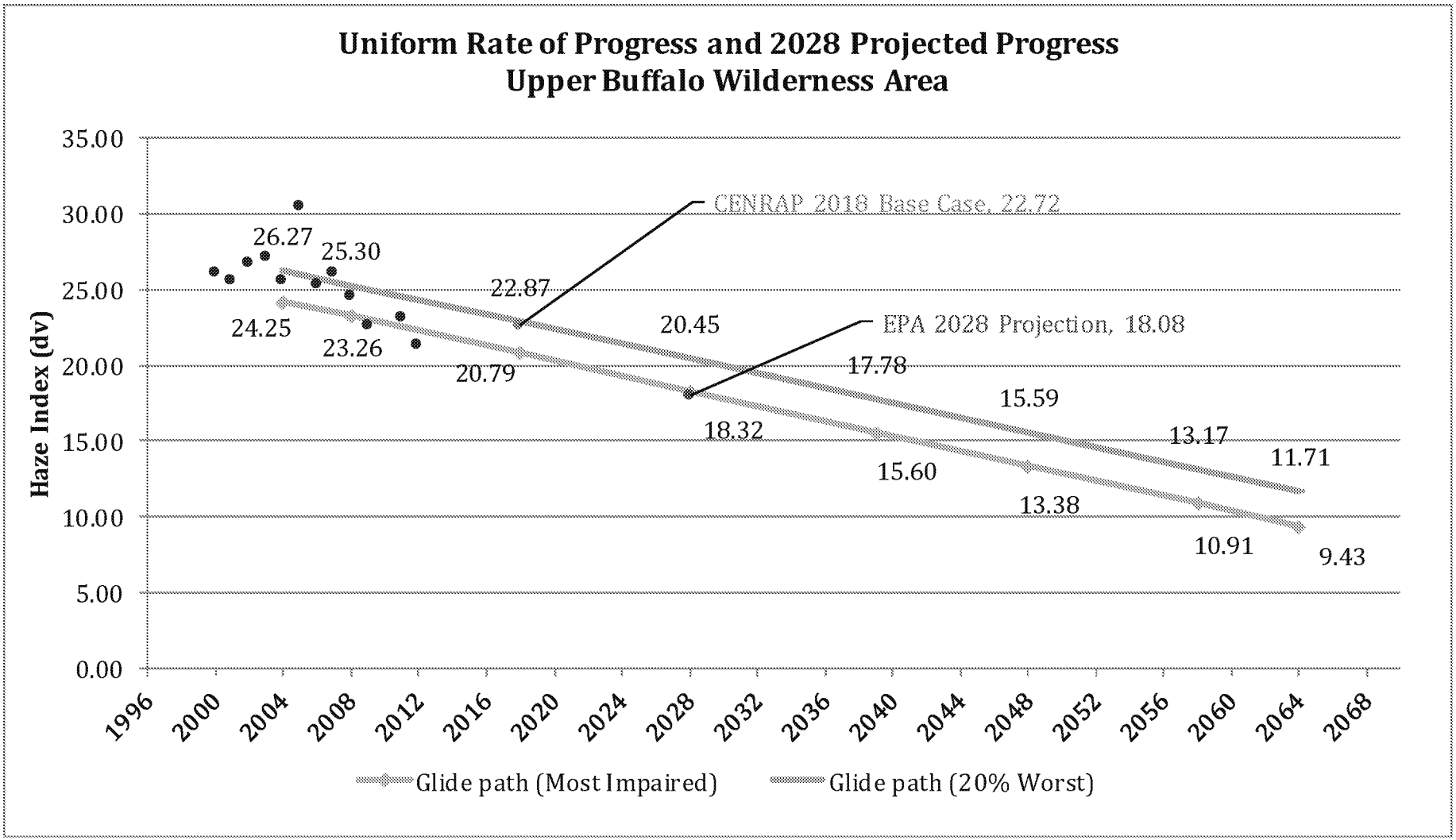
Revised Glidepath for Mingo



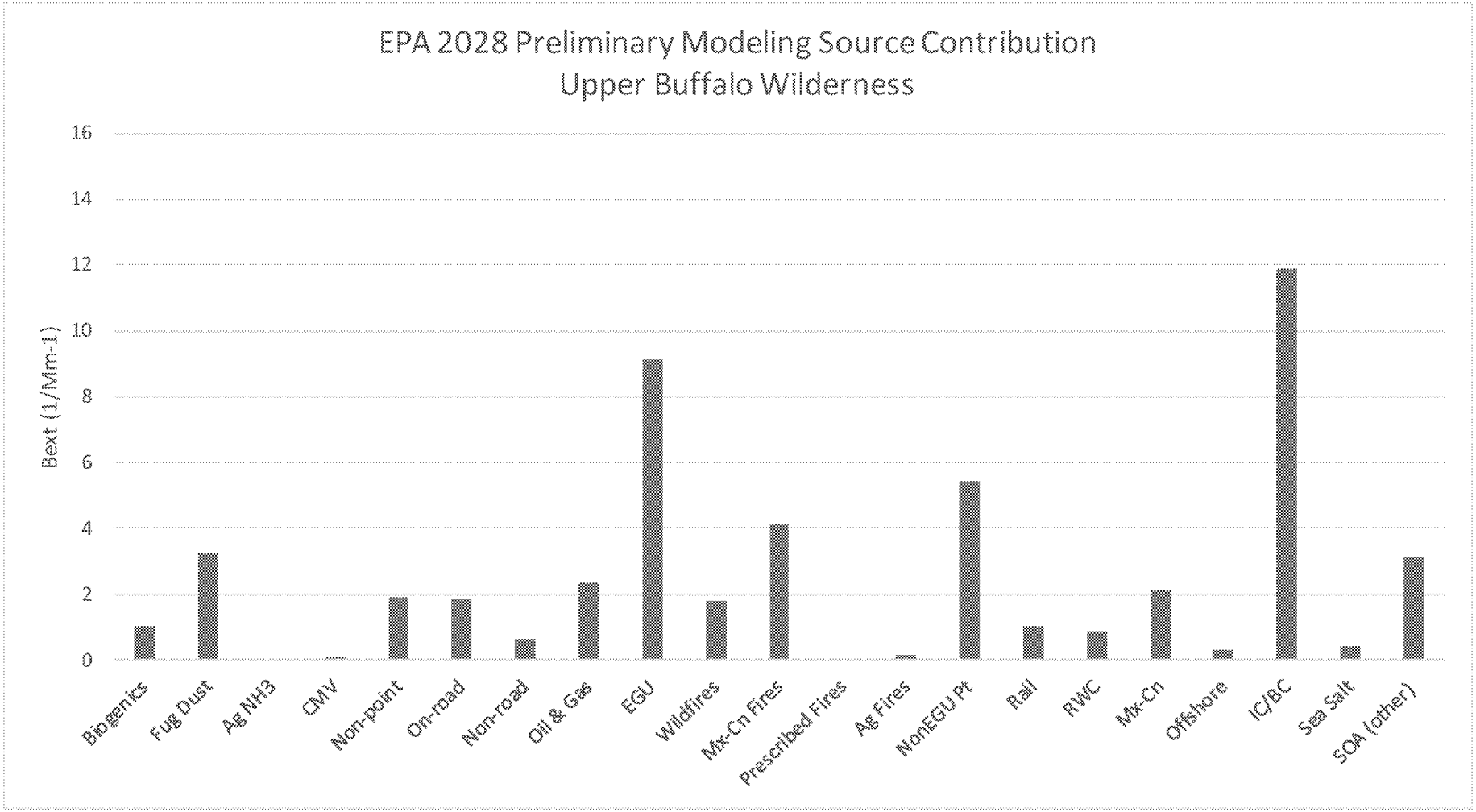
Mingo Source Contribution



Revised Glidepath for Upper Buffalo



Upper Buffalo Source Contribution



Summary

- Low Sulfur Coal is not an “existing control” for BART or RP
- Replacement SIP reliance on 4 factor analysis is problematic
- Long Term Strategy should include CTUC dates
- EPA & NGOs continue to push forward Obama-era Regional Haze Program

Numerous technical and legal deficiencies could be cured through re-proposal of the Replacement SIP

Entergy Services, Inc., on behalf of Entergy Arkansas, Inc.

Entergy®

Analysis of Reasonable Progress
Arkansas Regional Haze Program
First Planning Period

Submitted to:

Arkansas Department of Environmental Quality (ADEQ)
Office of Air Quality
5301 Northshore Drive
North Little Rock, AR 72118-5317

Prepared By:

TRINITY CONSULTANTS
5801 E. 41st St., Suite 450
Tulsa, OK 74135
(918) 622-7111

September 27, 2017

Trinity Project 173702.0014

Trinity Consultants

EHS solutions delivered uncommonly well

TABLE OF CONTENTS

LIST OF FIGURES

LIST OF TABLES

1. EXECUTIVE SUMMARY

This report provides an update to the monitoring information originally provided by Entergy Arkansas, Inc. (EAI) and Trinity Consultants (Trinity) on August 7, 2015[1] and updated on November 15, 2016[2], and analyzes Reasonable Progress for the Regional Haze Program's first planning period (ending in 2018) – specifically addressing the controls that would be needed to meet the emission limits for EAI's Independence units in the final Arkansas Regional Haze Federal Implementation Plan (FIP).[3]

The Interagency Monitoring of Protected Visual Environments (IMPROVE) has established a network of monitoring stations at mandatory Federal Class I areas across the country to measure and record visibility parameters from the atmosphere, such as sulfate and nitrate particles. From this monitoring data, visibility impairment, or haze, is determined. As of the date of this report, the most recent annual summary available is for calendar year 2015. Though the complete dataset and summary for 2016 is not yet available, un-summarized monitoring data up to July 31, 2016 are available. From this, current visibility conditions can be derived.

As presented in this report, visibility at the Class I areas in Arkansas – Caney Creek Wilderness Area (CACR) and Upper Buffalo Wilderness Area (UPBU) – has improved at a rate faster than necessary to maintain the Uniform Rate of Progress (URP) towards the Regional Haze Program goal of elimination of manmade visibility impairment by 2064. The monitoring data demonstrate that visibility improvement at these Class I areas currently exceeds EPA's goals for the first planning period even though the majority of the emission controls prescribed by the FIP have yet to be installed. The same can be said of the two Class I areas in Missouri – Mingo Wilderness Area (MING) and Hercules-Glades Wilderness Area (HEGL) – as documented in Missouri's Five-Year Progress Report to EPA.[4]

The FIP mandates NO_X and SO_2 emission limits for EAI's Independence units 1 and 2 to achieve reasonable progress towards the Regional Haze Program goal. However, due to the current and forecasted status of visibility in the Class I areas, the planned compliance strategies for Best Available Retrofit Technology (BART) requirements (*e.g.*, the cessation of coal burning at EAI's White Bluff facility in 2028),[5] implementation of other Clean Air Act (CAA) programs such as the

[1] Trinity Consultants, *Regional Haze Modeling Assessment Report – Entergy Arkansas, Inc. – Independence Plant*, August 7, 2015 (Trinity Project No. 154401.0074), submitted as an Exhibit C to Entergy Arkansas, Inc.'s *Comments On the Proposed Regional Haze and Interstate Visibility Transport Federal Implementation Plan for Arkansas.*

[2] Trinity Consultants, *Assessment of Recent Class I Area IMPROVE Monitoring Data*, November 15, 2016 (Trinity Project No. 163701.0059).

[3] Promulgation of Air Quality Implementation Plans; State of Arkansas; Regional Haze and Interstate Visibility Transport Federal Implementation Plan; Final Rule, 81 Fed. Reg. 66,332 – 66,421 (September 27, 2016).

[4] State of Missouri Regional Haze 5-Year Progress Report (https://dnr.mo.gov/env/apcp/reghaze/complete-RegionalHaze-5-yr-Rpt-submittal.pdf), August 29, 2014, p. 17.

[5] The emissions control technologies on which the BART SO_2 and NO_X emissions limits are based are identified in Appendix C. Certain of the units subject to the FIP also intend to install NO_X emissions controls to meet CSAPR. For example, EAI is planning to install low NO_X burners and separated overfire air at White Bluff and Independence to comply with CSAPR's ozone season NO_X program.

Cross State Air Pollution Rule (CSAPR), and considering the four reasonable progress factors[6] (including EAI's proposed cessation of coal use at Independence by 2030 as part of resolving the 8th Circuit Court of Appeals FIP litigation), the emission limits required by the FIP for EAI's Independence units 1 and 2 are not necessary.

[6] EAI asserts that consideration of these factors is not necessary with respect to Arkansas' sources for the first planning period. However, without waiver, the four factors are addressed herein to provide a more comprehensive evaluation of reasonable progress for Arkansas' Class I areas.

2. INTRODUCTION TO VISIBILITY AND HAZE INDEX

Visibility is most simply measured as the farthest distance that can naturally be seen by an average human. Light waves diffract and are absorbed as they pass through and around particles and molecules in the atmosphere. The level of visibility therefore naturally decreases at greater distances as light waves come into contact with a greater number of these miniscule obstacles. This natural scattering of light waves is called Rayleigh scattering. Additionally, both anthropogenic (manmade) and non-anthropogenic sources of pollution, which result in increased atmospheric concentrations of particles and molecules, have an effect on visibility. The primary contributors to visibility impairment or "light extinction" include sulfates, nitrates, organic carbon, elemental carbon, crustal material, and sea salt."[7,8] Through the Interagency Monitoring of Protected Visual Environments (IMPROVE) program, concentrations of these species are monitored at each mandatory Federal Class I area[9] every three (3) days for 24 hours. The species concentrations are converted to light extinction using the Revised IMPROVE Equation:[10,11]

Equation 1. Revised IMPROVE Equation

$$\begin{aligned} b_{ext} = 2.2 \times & f_S(RH) \times [Small\ Sulfate] \\ & + 4.8 \times f_L(RH) \times [Large\ Sulfate] \\ & + 2.4 \times f_S(RH) \times [Small\ Nitrate] \\ & + 5.1 \times f_L(RH) \times [Large\ Nitrate] \\ & + 2.8 \times [Small\ Organic\ Mass] \\ & + 6.1 \times [Large\ Organic\ Mass] \\ & + 10 \times [Elemental\ Carbon] \\ & + 1 \times [Fine\ Soil] \\ & + 1.7 \times f_{SS}(RH) \times [Sea\ Salt] \\ & + 0.6 \times [Coarse\ Mass] \\ & + Rayleigh\ Scattering\ (Site\ Specific) \\ & + 0.33 \times [NO_2(ppb)] \end{aligned}$$

Where b_{ext} represents the light extinction coefficient in inverse megameters (Mm^{-1}), and individual species concentrations are shown in brackets with units of micrograms per cubic meter ($\mu g/m^3$). The f_L and f_S terms are unitless water growth factors given as functions of relative humidity (RH) for concentrations of large and small sulfates and nitrates, while f_{SS} represents the water growth factor for sea salt concentrations. The numerical constants given in the equation (e.g., 2.2) represent

---

[7] U.S. EPA, *Visibility in Mandatory Federal Class I Areas (1994-1998): A Report to Congress.* EPA-452/R-01-008. Chapter 1 – Introduction to Visibility Issues. November 2001.

[8] Kumar, Naresh, et al. "Revised Algorithm for Estimating Light Extinction from IMPROVE Particle Speciation Data." Journal of the Air & Waste Management Association JAWMA 57.11 (2007): 1326-336.

[9] Mandatory Federal Class I areas included all international parks (IP), national wilderness areas exceeding 5,000 acres, national memorial parks exceeding 5,000 acres, and national parks exceeding 6,000 acres, in existence on August 7, 1977, and are listed, by state, in 40 Code of Federal Regulations §§81.401 – 437.

[10] In 1999, an equation to estimate light extinction based on available IMPROVE data was incorporated into the Regional Haze Rule (Old IMPROVE Equation). In 2007, a revised equation was developed to reduce "bias for high and low light extinction extremes" and to make the equation "more consistent with the recent atmospheric aerosol literature (Revised IMPROVE Equation).

[11] U.S. EPA, *Visibility in Mandatory Federal Class I Areas (1994-1998): A Report to Congress.* EPA-452/R-01-008. Chapter 1 – Introduction to Visibility Issues. November 2001.

dry mass extinction efficiency terms in units of square meters per gram (m^2/g).[12] Measurements and calculated light extinction values are published by IMPROVE on a Colorado State University webpage.[13]

Because the units for light extinction (Mm^{-1}) are difficult to conceptualize and compare in practical terms, the haze index (deciview or dv) was developed. The haze index is calculated as a function of the ratio of the calculated light extinction coefficient to the approximate average extinction value due to Rayleigh scattering alone (10 Mm^{-1}).

Equation 2. Formula for Haze Index (dv)

$$Haze\ Index\ (dv) = 10 \times \ln\left(\frac{b_{ext}\ [Mm^{-1}]}{10\ [Mm^{-1}]}\right)$$

The deciview scale provides a simpler representation of visibility deterioration, with natural conditions having a calculated haze index of approximately zero deciviews, depending on the site-specific level of Rayleigh scattering.[14] The larger the haze index, the more degradation of visibility at a particular location. According to EPA, a one-deciview change represents a "small but noticeable change in haziness".[15] Other studies, however, have suggested that a "1-deciview change never produces a perceptible change in haze."[16]

[12] Kumar, Naresh, et al. "Revised Algorithm for Estimating Light Extinction from IMPROVE Particle Speciation Data." Journal of the Air & Waste Management Association JAWMA 57.11 (2007): 1326-336.

[13] IMPROVE. Regional Haze Rule Summary data through 1988-2015. (http://views.cira.colostate.edu/fed/SiteBrowser/Default.aspx)

[14] U.S. EPA, *Visibility in Mandatory Federal Class I Areas (1994-1998): A Report to Congress.* EPA-452/R-01-008. Chapter 1 – Introduction to Visibility Issues. November 2001.

[15] Regional Haze Regulations; Final Rule, 64 Fed. Reg. 35,725 - 35,727 (July 1, 1999).

[16] Ronald C. Henry, "Just-Noticeable Differences in Atmospheric Haze," Journal of the Air & Waste Management Association, Vol. 52 at 1,238 (October 2002).

3. REGIONAL HAZE RULE

Section 169A of the Clean Air Act (CAA) requires implementation plans which address visibility protection for federal Class I areas to include "emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal" of elimination of manmade visibility impairment at such areas.[17] To effectuate the CAA's national visibility goal, EPA promulgated the Regional Haze Rule, which has as its own goal to achieve natural visibility conditions in each Class I area by 2064.[18] There are two federal Class I areas located in Arkansas for which measures are required to make reasonable progress: Caney Creek Wilderness Area (CACR) and Upper Buffalo Wilderness Area (UPBU).

When tracking the progress of remedying visibility impairment at a particular Class I area based on measured data, EPA recommends taking the average of the haze indices, in deciviews, associated with the 20 percent most impaired days of the year (*i.e.*, "20 percent worst") and the 20 percent least impaired days of the year (*i.e.*, "20 percent best").[19] To achieve the goal, the average haze index for the 20 percent worst days must improve to meet the level of the 20 percent best days, and the 20 percent best days value must not degrade.[20]

A "glidepath" from the 20 percent worst days average to the 20 percent best days average is defined for each Class I area. It is called the Uniform Rate of Progress ("URP"). The URP is a straight line from baseline visibility conditions (average 20 percent worst days as of 2004) to natural visibility conditions (to be achieved in 2064 for the 20 percent worst days). The slope of that line is the difference between the two conditions divided by the 60-year program. The URPs for CACR and UPBU are presented in Figure 3-1 and Figure 3-2, respectively.

In addition to establishing URPs for each Class I area, as part of each state's Long Term Strategy, states (or EPA) also establish Reasonable Progress Goals (RPGs) for each area for the end of each planning period, i.e., 2018, 2028, and so on. The 2018 RPGs set by EPA for the Arkansas Class I areas are 22.47 dv for CACR and 22.51 dv for UPBU.[21]

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[17] 42 U.S.C. § 7491(b)(2).
[18] Regional Haze Regulations; Final Rule, 64 Fed. Reg. 35,732 and 35,766 (July 1, 1999).
[19] Regional Haze Regulations; Final Rule, 64 Fed. Reg. 35.728 and 35,730 (July 1, 1999).
[20] Regional Haze Regulations; Final Rule, 64 Fed. Reg. 35.730 and 35,734 (July 1, 1999).
[21] Promulgation of Air Quality Implementation Plans; State of Arkansas; Regional Haze and Interstate Visibility Transport Federal Implementation Plan; Final Rule, 81 Fed. Reg. 66,354 (September 27, 2016).

Figure 3-1. CACR Uniform Rate of Progress

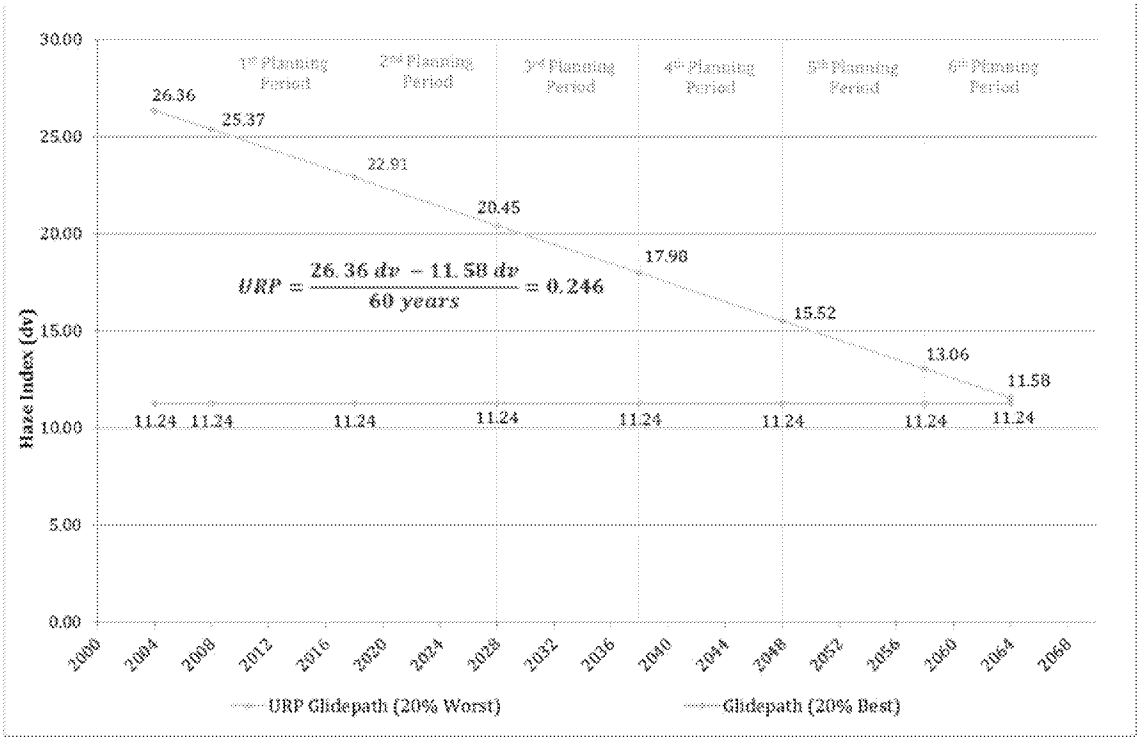
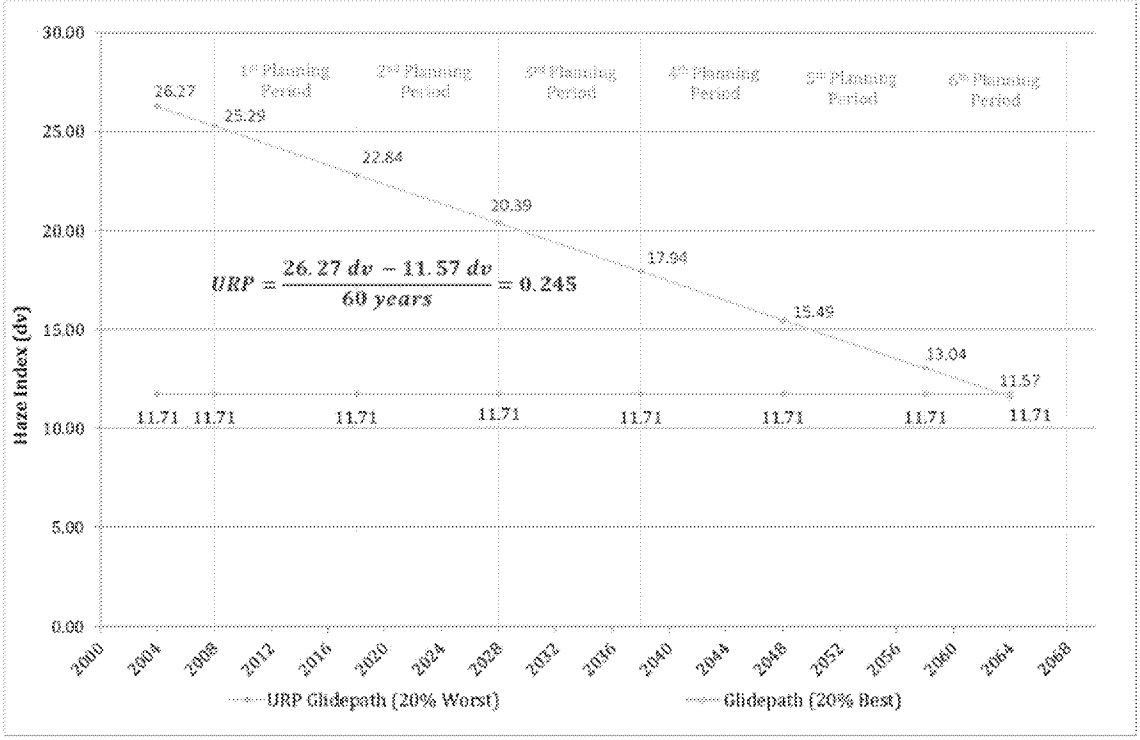


Figure 3-2. UPBU Uniform Rate of Progress



4. RECENT IMPROVE MONITORING DATA

The most recent and complete summary of annual monitoring data available from IMPROVE for CACR and UPBU covers the year 2015. However, as of the date of this report, non-summarized data through July 31, 2016, is available and can be used to calculate the light extinction coefficients (see Equation 1) and haze indices (see Equation 2) for January through July of 2016. Trinity obtained the non-summarized data and compiled an independent summary for January through July of 2016.[22] The species-specific and total light extinction and haze index values for the averages of the 20 percent worst days and the 20 percent best days for the first half of 2016 are shown in Table 4-1.

Table 4-1. Independent Summary of Monitoring Data for January 1, 2016 through July 31, 2016

	20 Percent Worst Days Average		20 Percent Best Days Average	
Light Extinction Value (Mm^{-1})	**CACR**	**UPBU**	**CACR**	**UPBU**
Sulfate	31.46	28.84	4.72	4.80
Nitrate	16.86	21.03	1.04	1.17
Organics	18.49	17.81	2.21	2.31
Carbon	2.96	3.58	0.32	0.38
Soil	3.20	2.78	0.10	0.10
Coarse PM	6.78	6.86	1.41	1.20
Sea Salt	1.12	0.81	0.06	0.06
Total Light Extinction (Mm^{-1})	74.30	72.85	24.75	26.72
Haze Index (dv)	**19.90**	**19.67**	**8.83**	**9.67**

Table 4-2 presents a summary of the annual-average haze index values for each year from 2002 to 2016 (based on first half of the year).[23]

Table 4-2. Summary of Annual Average Haze Index Values from 2002 through 2016

	20 Percent Worst Days Average		20 Percent Best Days Average	
Year	**CACR**	**UPBU**	**CACR**	**UPBU**
2002	27.21	26.74	11.88	12.83
2003	26.54	27.22	10.74	10.62
2004	25.34	25.58	11.11	10.74
2005	29.21	30.47	12.93	13.34
2006	25.68	25.42	12.51	13.00
2007	--	26.17	--	12.45
2008	23.70	24.60	9.24	10.49
2009	22.68	22.62	8.09	9.40
2010	22.94	--	10.76	--
2011	22.67	23.21	11.71	11.51
2012	21.49	21.56	9.54	10.31
2013	21.35	21.25	8.61	8.60
2014	20.72	20.49	8.52	8.13
2015	20.41	19.96	7.03	7.50
2016	19.90	19.67	8.83	9.67

[22] The calculations and data summarizing method were confirmed by downloading and processing the un-summarized data for 2014 and then comparing the results to the values in the 2014 summary found online.

[23] Summarized data are not available for CACR for 2007, UPBU for 2010, and MING for 2002 through 2005.

5. MONITORING DATA COMPARED TO REGIONAL HAZE GOALS

Figure 5-1 and Figure 5-2 present, for CACR and UPBU, respectively, comparisons of the observed haze index values (*see* Section 4) for each year of IMPROVE data, including values from the first half of 2016, to the URPs (*see* Section 3). The same comparisons are shown for the two Missouri Class I areas in Appendix B.

Figure 5-1. CACR Monitored Observations Compared to Uniform Rate of Progress

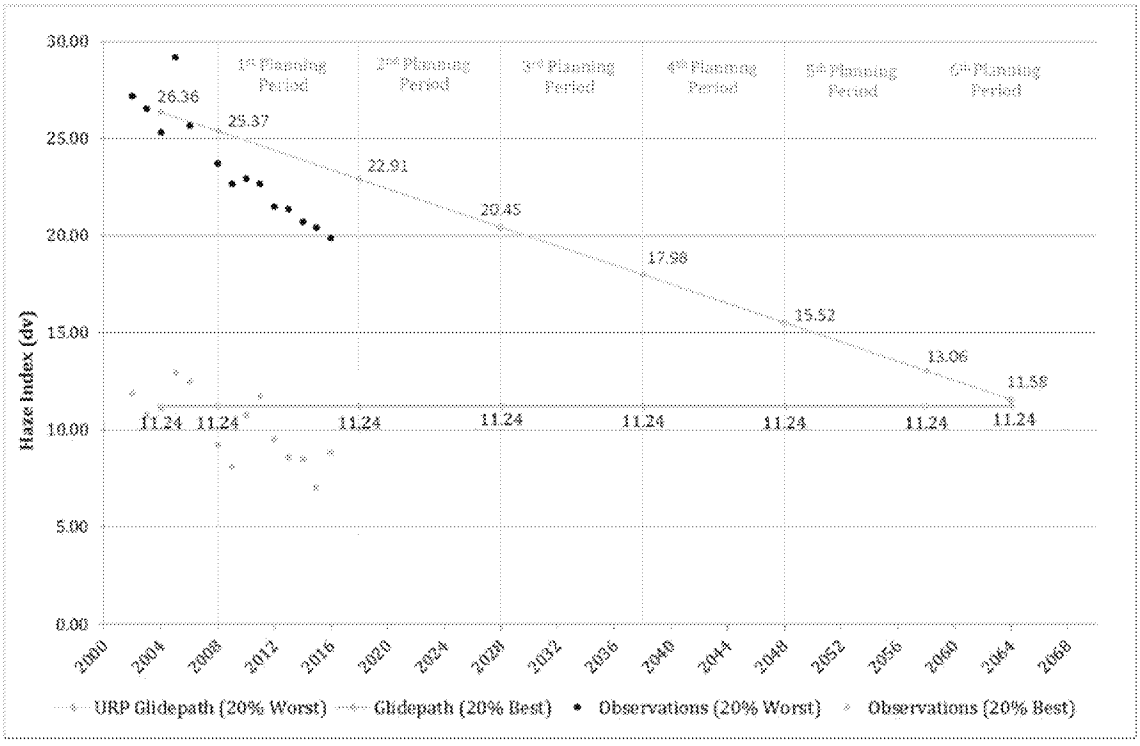
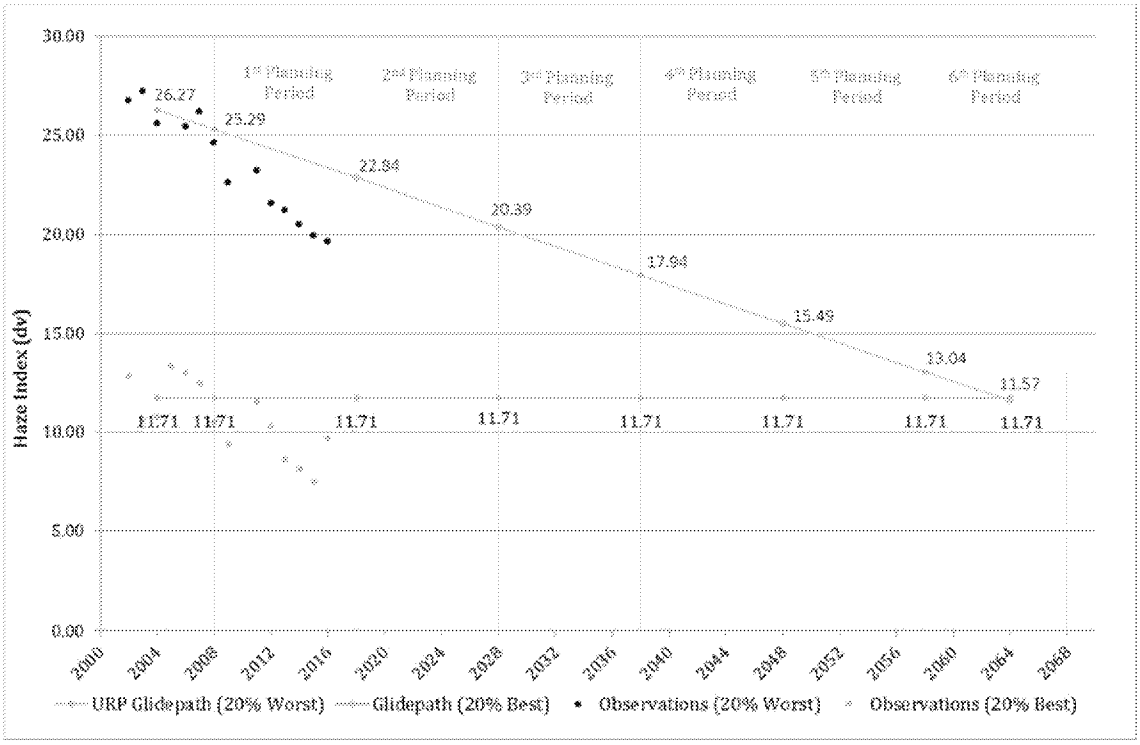


Figure 5-2. UPBU Monitored Observations Compared to Uniform Rate of Progress



As seen in the figures above, the actual visibility impairment, measured as the average of the 20 percent worst days each year, at these Class I areas has declined sharply from 2002 through July of 2016 (the most recent available data). According to the monitor data, the current (January through July 2016) observed 20 percent worst days average haze index values are below the URP values for 2018 as well as the 2018 RPG values. Table 5-1 presents a comparison of the 2016 observed values and the 2018 RPG values.

Table 5-1. 2016 Observed Haze Index Values Compared to 2018 URPs and RPGs

Class I Area	Observed 20 Percent Worst Days Average for 2016 (first half year)	RPG for 2018	Observed Value as % of RPG
CACR	19.90	22.47	88.6 %
UPBU	19.67	22.51	87.4 %

6. REGIONAL HAZE REQUIREMENTS FOR FIRST PLANNING PERIOD

The visibility improvement in the Class I areas that are presented in previous sections of this report have been achieved without installation of any controls for BART or Reasonable Progress at Arkansas' point sources during the time period covered by the visibility index values presented above. Appendix C identifies the emissions control technologies on which the FIP's BART emissions limits are based. To meet the emission limits determined to represent reasonable progress towards the national visibility goal for the first planning period under the FIP, Independence must install NO_X controls by April 27, 2018, and SO_2 controls by October 27, 2021.[24] However, these controls are clearly unnecessary to maintain the URP during the first planning period. Visibility improvement is already on an accelerated pace such that the rate of progress towards the national visibility goal exceeds the uniform rate necessary to remedy visibility impairment at CACR and UPBU by 2064. Given the visibility conditions and the Arkansas sources' ongoing environmental compliance strategies across the CAA programs, it should be concluded that no further measures are necessary for Arkansas to make reasonable progress toward the Regional Haze Program national goal in the first planning period.

This conclusion is consistent with EPA's own guidance to the states, which advises a long-term view of reasonable progress: "you should take into account the fact that the long-term goal of no manmade impairment encompasses several planning periods. It is reasonable for you to defer reductions to later planning periods in order to maintain a consistent glidepath toward the long-term goal."[25] Also, "[g]iven the significant emissions reductions that we anticipate to result from BART...and other Clean Air Act programs...it may be all that is necessary to achieve reasonable progress in the first planning period for some States."[26]

Specifically, the Reasonable Progress emission limits in the FIP--which would require the installation of Spray Dry Absorbers (SDA) on EAI's Independence units 1 and 2--are unnecessary for Arkansas to make reasonable progress toward meeting the national goal in the first planning period. EPA's primary justification for proposing Reasonable Progress limits at Independence is that "it would be unreasonable to ignore a source representing more than a third of the State's SO_2 emissions and a significant portion of NO_X point source emissions."[27] EPA further supports its conclusion that emission limits based on the installation of major control technology are justified based on a finding that the proposed controls at Independence are cost effective.[28] However, the fact that a source may have significant emissions, or that it would be cost effective to control such

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[24] Promulgation of Air Quality Implementation Plans; State of Arkansas; Regional Haze and Interstate Visibility Transport Federal Implementation Plan; Final Rule, 81 Fed. Reg. 66,332 - 66,421 (September 27, 2016). The SO_2 compliance date was reiterated by EPA on September 11, 2017, in 82 Fed. Reg. 42,639. EPA proposed to extend the NO_X compliance deadline by 21 months to January 27, 2020, in 82 Fed. Reg. 32,284 (July 13, 2017).

[25] U.S. EPA, *Guidance for Setting Reasonable Progress Goals Under the Regional Haze Program*, June 1, 2007, p. 1-4.

[26] Ibid, p. 4-1.

[27] Promulgation of Air Quality Implementation Plans; State of Arkansas; Regional Haze and Interstate Visibility Transport Federal Implementation Plan; Final Rule, 81 Fed. Reg. 18,992 (September 27, 2016).

[28] Ibid, pp. 18,994-97. As noted in EAI's comments on the Proposed FIP, however, EPA's cost calculations substantially underestimated the costs to install dry scrubbers at Independence and an accurate estimate of the costs would have rendered the controls not cost effective for reasonable progress purposes. Entergy Arkansas, Inc. Comments on the Proposed Regional Haze and Interstate Visibility Transport Federal Implementation Plan for Arkansas, at 44 (Aug. 7, 2015), EPA Docket No. EPA-R06-OAR-2015-0189-0166 ("EAI Comments").

emissions, is irrelevant for Reasonable Progress purposes for the reasons stated above. Moreover, as discussed below, the FIP-required emission limits at Independence--allegedly established to achieve reasonable progress for the first planning period despite that fact that visibility at Arkansas' Class I areas is already better than EPA's own RPGs for that period--are unreasonable in consideration of the four statutory factors for evaluating the feasibility of reasonable progress requirements.[29]

A. **The non-air quality environmental impacts of SDA at Independence.** Non-air quality environmental impacts of SDA primarily relate to available water resources and waste byproducts. SDA systems consume a significant quantity of water, and the required water must be relatively clean. In addition, SDA systems also generate a large waste byproduct stream, containing calcium salts, which must be landfilled. If not fixated during the disposal process, the calcium salts are soluble and may dissolve and appear in the landfill leachate.

B. **The cost of compliance, time necessary for compliance, and remaining useful life (RUL) of the Independence coal units.** As part of resolving the 8th Circuit FIP appeal litigation, Entergy proposes to cease to combust coal at the Independence units by the end of 2030. When the coal units' RUL is properly considered along with the time necessary for compliance with the SO_2 emission limit (*e.g.* the 5-year compliance deadline in the FIP), the costs of compliance for each unit are approximately $4,000/ton of SO_2 removed according to EPA's own cost estimates.[30] These costs are not reasonable or cost-effective.

   Figure 6-1 presents cost effectiveness values for SDA for the Independence units calculated using the spreadsheet developed by EPA for the FIP[31], revised to reflect a 9-year equipment life. The 9-year life is based on a 2030 date for the end of the coal-burning life and, conservatively, on the FIP's compliance date of 2021.[32]

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[29] 42 U.S.C. § 7491(g)(1). EAI asserts that consideration of these factors is not required because no further measures are necessary for Arkansas to make reasonable progress toward the Regional Haze Program national goal during the first planning period. However, without waiver, the four factors are addressed herein to provide a more comprehensive evaluation of reasonable progress for Arkansas' Class I areas.

[30] All cost values in this report are presented solely for the purpose of this report and without waiving previously documented positions regarding proper cost estimating methods and inputs. *See* EAI Comments at 7-11.

[31] "White Bluff_R6 cost revisions2-revised.xlsx" from EPA Docket EPA-R06-OAR-2015-0189-0205. Before revising the equipment life value, the cost effectiveness ($/ton) results matched the values presented in the final FIP: $2,853/ton and $2,634/ton for Unit 1 and Unit 2, respectively.

[32] Considering the current state of the FIP and the replacement SIP that Arkansas is developing, a more realistic compliance date would be 2023 – five years from an anticipated final approval of the SIP in 2018. The five-year compliance timeline is the minimum necessary for engineering, procuring, installing, and commissioning a SDA.

Figure 6-1. EPA Estimated Cost Effectiveness for SDA for Independence Units 1 and 2, Revised to Consider a Shortened Remaining Useful Life

Independence Unit 1

Item	Corrected White Bluff Cost to 0.68 lbs/MMBtu	Comments
Total Annualized Cost	$54,903,656	Assumed same as White Bluff Unit 1
Interest Rate (%)	7	
Equipment Lifetime (years)	9	
Capital Recovery Factor (CRF)	0.1535	
SO2 Emission Rate (lbs/MMBtu)	0.63	Max monthly value from 2009-2013 for Unit 1
Controlled SO2 Emission Rate (%)	90.49	Assume 95%. If outlet < 0.06 lbs/MMBtu, then assume % control for 0.06 lbs/MMBtu.
SO2 Emission Baseline (tons)	14,269	3 -yr avg. 2009-2013 for Unit 1, excluding max and min
SO2 Emission Reduction (tons)	12,912	
Cost Effectiveness ($/ton)	$4,252	

Independence Unit 2

Item	Corrected White Bluff Cost to 0.68 lbs/MMBtu	Comments
Total Annualized Cost	$54,903,656	Assumed same as White Bluff Unit 1
Interest Rate (%)	7	
Equipment Lifetime (years)	9	
Capital Recovery Factor (CRF)	0.1535	
SO2 Emission Rate (lbs/MMBtu)	0.61	Max monthly value from 2009-2013 for Unit 2
Controlled SO2 Emission Rate (%)	90.19	Assume 95%. If outlet < 0.06 lbs/MMBtu, then assume % control for 0.06 lbs/MMBtu.
SO2 Emission Baseline (tons)	15,511	3 -yr avg. 2009-2013 for Unit 2, excluding max and min
SO2 Emission Reduction (tons)	13,990	
Cost Effectiveness ($/ton)	$3,925	

(red text reflects revised equipment life values; no other inputs or equations/cell-references were changed; yellow-highlighting is original to EPA's spreadsheet;)

A. The minimal contribution that the Independence units – and Arkansas point sources in general – have on visibility impacts in the Class I areas. As documented in EAI's comments on the proposed FIP[33] and further explained in Appendix A to this report, the emissions from Independence are one of many factors contributing to haze at Arkansas' Class I areas but have only a minimal impact on visibility impairment. Therefore, emissions controls at Independence would have no discernable impact on visibility.

[33] *See* EAI Comments at 17-43.

7. LONG TERM STRATEGY CONSIDERATIONS

Visibility impairment has steadily declined throughout the first planning period. The reductions in visibility-impairing emissions have occurred across nearly the entire spectrum of source types – from point sources to areas sources and mobile sources. It is expected that further improvements will be more difficult as visibility impairment values move closer to natural conditions. For example, the difficulty of even quantifying improvements from area sources was recognized by EPA when it agreed not to evaluate such sources for Reasonable Progress controls in the first planning period.[34] As documented in Appendix A, the single largest source type influencing Arkansas' share of the contribution to visibility impairment is area sources (not point sources like Independence). However, planned emissions decreases, e.g., resulting from the implementation of CSAPR and the increasingly more stringent National Ambient Air Quality Standards (NAAQS)[35], should cause visibility impairment to continue to decline. The cessation of coal usage at both White Bluff in 2028 and at Independence in 2030 will supplement these decreases.

[34] Approval and Promulgation of Implementation Plans; Arkansas; Approval of Regional Haze State Implementation Plan Revision and Withdrawal of Federal Implementation Plan for NO_X for Electric Generating Units in Arkansas; Proposed Rule, 82 Fed. Reg. 42,632 (September 11, 2017).

[35] The Arkansas Department of Environmental Quality (ADEQ), in consultation with Federal Land Managers and other states, addressed additional ongoing air pollution control programs as well as mitigation of construction activities, source retirements/replacements, smoke management, and other visibility-affecting measures related to all sources – major and minor stationary sources, mobile sources, and area sources – as part of its Long Term Strategy in its September 9, 2008 *State of Arkansas Regional Haze Rule State Implementation Plan.*

APPENDIX A: ANALYSIS OF SOURCE CATEGORY AND SOURCE-SPECIFIC CONTRIBUTIONS TO CLASS I AREA VISIBILITY IMPACTS

All data presented in this Appendix were extracted from the modeled source apportionment extinction data from the Central Regional Air Planning Association (CENRAP) Particulate Matter Source Apportionment Technique (PSAT) tool. The data were organized by geographic region and source category, so that the individual contribution of each source category in each geographic region could be determined.

EPA's Reasonable Progress analysis primarily focused on point source contributions to light extinction at CACR and UPBU. As a result, EPA chose to limit its evaluation of potential Reasonable Progress controls solely to Arkansas' largest emitting point sources - specifically, to Independence. However, Arkansas point sources are relatively insignificant contributors to visibility impairment in CACR and UPBU compared to most of the other regions modeled by CENRAP and are not even the biggest source group contributor in Arkansas to visibility impairment in these Class I areas.

Figures A-1 and A-2 display the modeled percent contribution of elevated and low-level point sources to the total light extinction at CACR and UPBU from the significantly contributing geographic regions.[36] Also included in these figures is the combined total percentage contribution from all point sources in all geographic regions. As shown in the CACR figure, of a total point source contribution of 61.85 percent at CACR in 2002, Arkansas's point sources contributed only 2.87 percent, making Arkansas point sources only the eighth highest point source contributor. Similarly, of the 60.35 percent total point source contribution at UPBU in 2002, Arkansas point sources were the ninth highest point source contributor with only a 2.47 percent contribution.

[36] These figures were originally presented as Figure 3 and Figure 4 in Entergy Arkansas Inc., *Comments On the Proposed Regional Haze and Interstate Visibility Transport Federal Implementation Plan for Arkansas*, Docket No. EPA-R06-OAR-2015-0189, August 7, 2015.

Figure A-1. Regional Point Source Percentage of Total Extinction at CACR (20 Percent Worst, 2002)

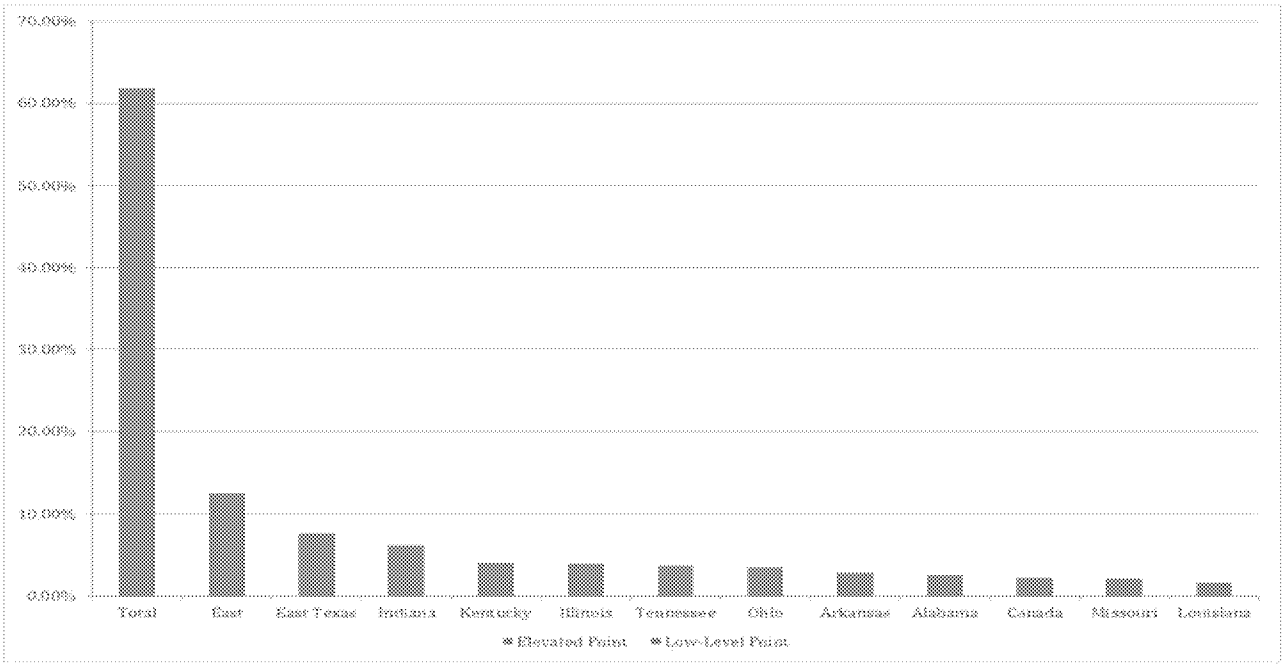
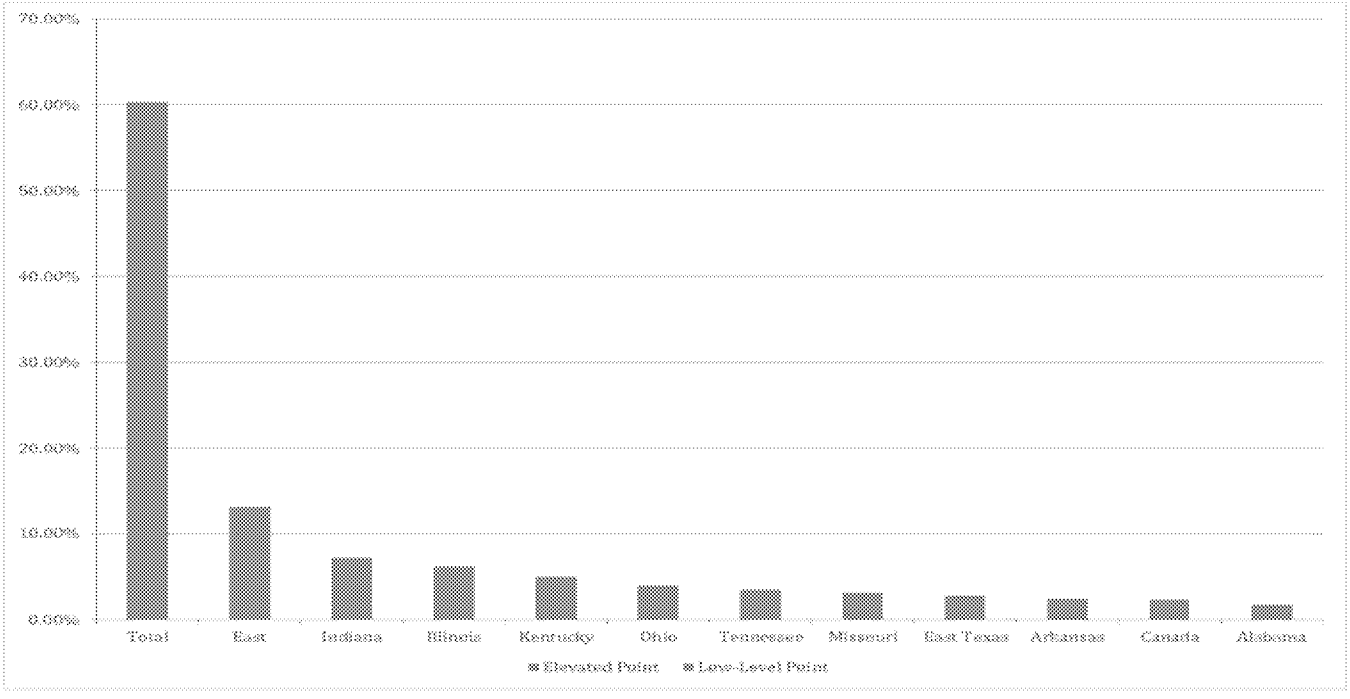


Figure A-2. Regional Point Source Percentage of Total Extinction at UPBU (20 Percent Worst, 2002)



In addition, as demonstrated in Figures A-3 and A-4 below, most of Arkansas' share of the contribution to visibility impairment comes from area and mobile sources, not point sources.[37] At

[37] These figures were originally presented as Figure 5 and Figure 6 in Entergy Arkansas Inc., *Comments On the Proposed Regional Haze and Interstate Visibility Transport Federal Implementation Plan for Arkansas*, Docket No. EPA-R06-OAR-2015-0189, August 7, 2015.

CACR, Arkansas area sources contribute 3.75 percent of the overall extinction and Arkansas' combined point source category (*i.e.*, elevated and low-level point sources) contributes only 2.87 percent. Even more significantly, Arkansas area sources contributed 5.09 percent towards extinction at UPBU compared to 2.47 percent from the combined Arkansas point sources.

Figure A-3. Regional Percentage of Total Extinction at CACR (20 Percent Worst, 2002)

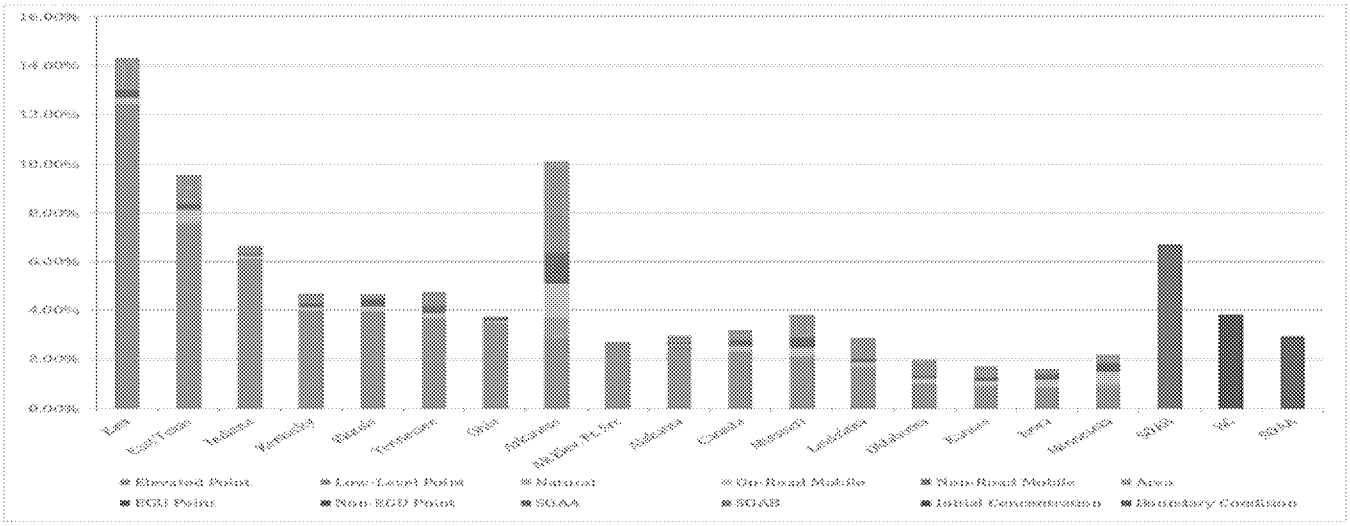
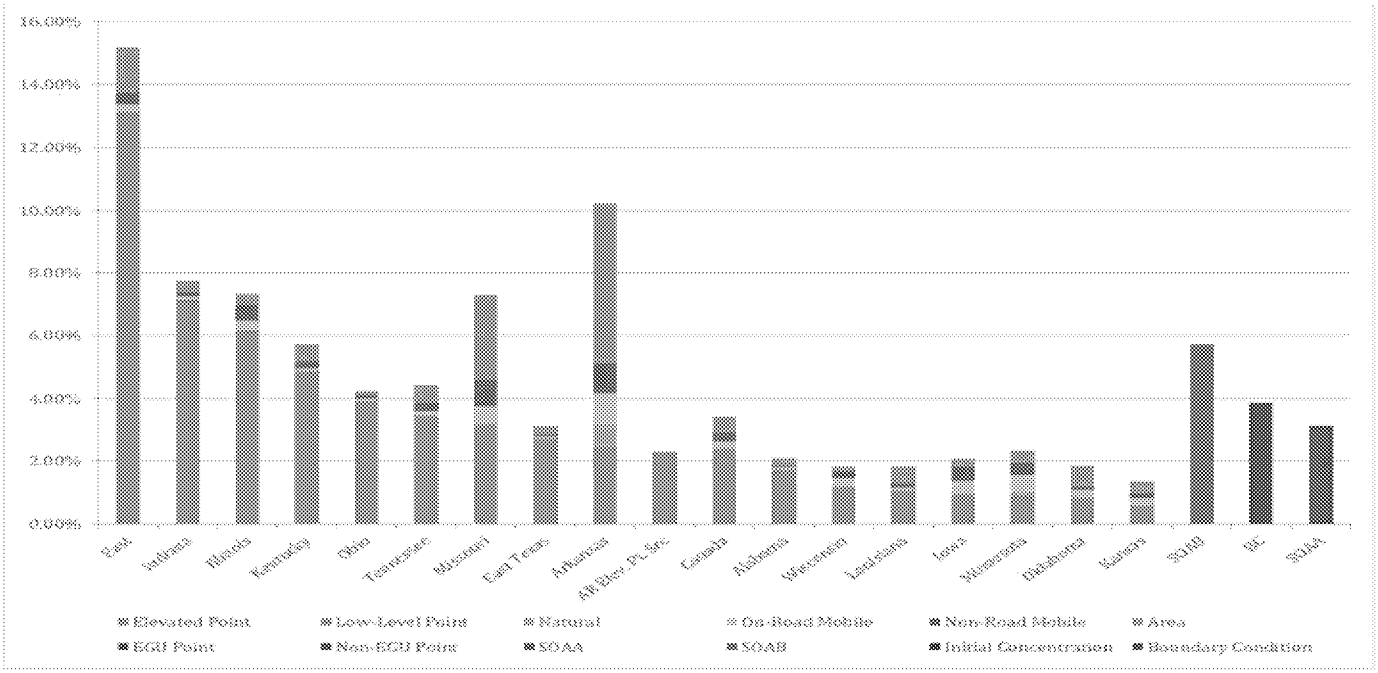


Figure A-4. Regional Percentage of Total Extinction at UPBU (20 Percent Worst, 2002)



On a source-specific (Independence-only) basis, the contribution is even smaller. CENRAP's predictive modeling demonstrates that sulfate from all (elevated and low level) Arkansas point sources is responsible for 3.58 percent of the total light extinction at CACR and 3.20 percent at UPBU; and nitrate from Arkansas point sources is responsible for 0.29 percent of the total light

extinction at CACR and 0.25 percent at UPBU.[38] The Independence units' share of emissions to this minimal contribution from Arkansas point sources to visibility impairment is even less. EAI and Trinity submitted CAMx modeling showing that the contribution to visibility impairment by Independence is less than one half of one percent of the visibility impairment in both Arkansas Class I areas.[39]

[38] Promulgation of Air Quality Implementation Plans; State of Arkansas; Regional Haze and Interstate Visibility Transport Federal Implementation Plan; Final Rule, 81 Fed. Reg. 18,990 (September 27, 2016).

[39] Entergy Arkansas Inc., *Comments On the Proposed Regional Haze and Interstate Visibility Transport Federal Implementation Plan for Arkansas*, Docket No. EPA-R06-OAR-2015-0189, August 7, 2015.

APPENDIX B: OBSERVATIONS COMPARED TO UNIFORM RATES OF PROGRESS FOR MISSOURI'S CLASS I AREAS

Figure B-1. MING Monitored Observations Compared to Uniform Rate of Progress

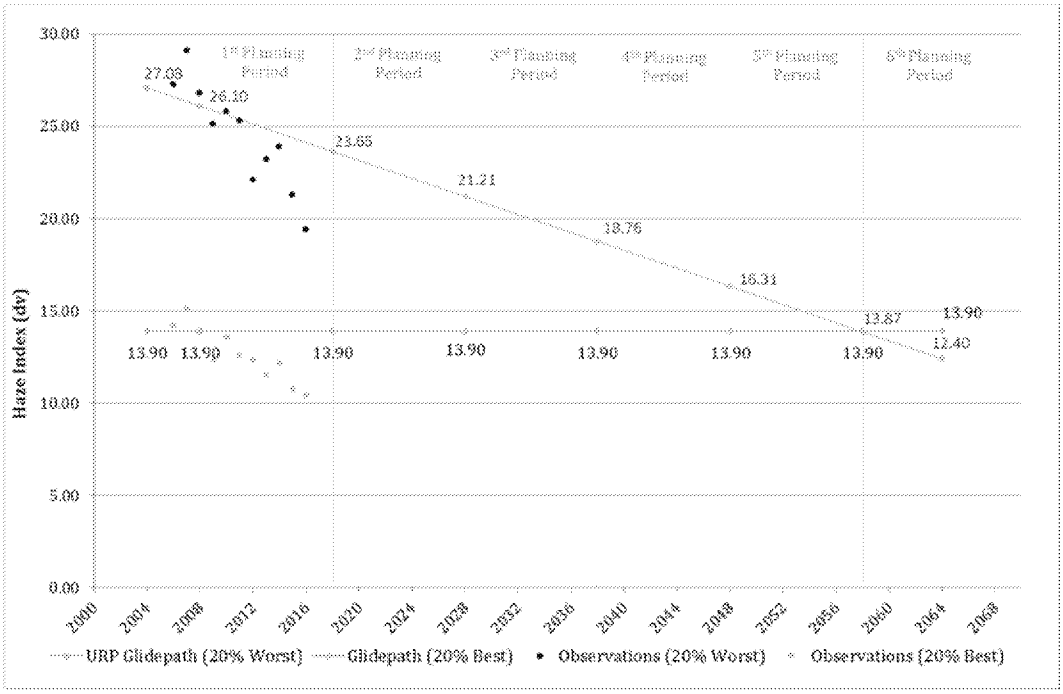
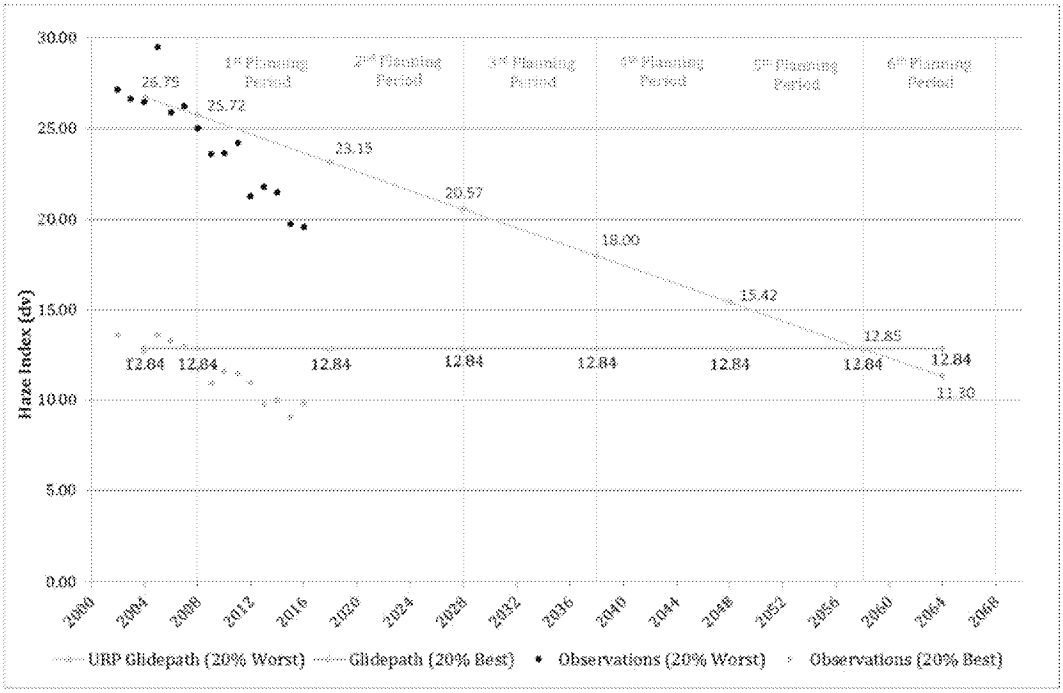


Figure B-2. HEGL Monitored Observations Compared to Uniform Rate of Progress



APPENDIX C: CONTROLS ON WHICH THE BART EMISSIONS LIMITS ARE BASED

The FIP's BART emission limits are based on the following emissions control technologies:[40]

Company	Facility	Unit	Controls	Compliance Deadline
AEP/SWEPCO	Flint Creek	1	Novel Integrated Desulfurization (NID)	April 27, 2018
			Low NO_X Burners & Over Fire Air (LNB/OFA)	April 27, 2018
AECC	Bailey	1	Fuel sulfur content limit	October 27, 2021
AECC	McClellan	1	Fuel sulfur content limit	October 27, 2021
EAI	White Bluff	1	Spray Dry Absorber (SDA)	October 27, 2021
			LNB/OFA	April 27, 2018
		2	SDA	October 27, 2021
			LNB/OFA	April 27, 2018
EAI	Lake Catherine	4	Burners Out Of Service (BOOS)	October 27, 2019
Domtar	Ashdown	Boiler 2	Additional scrubbing reagent	October 27, 2021
			LNB	October 27, 2021

[40] Promulgation of Air Quality Implementation Plans; State of Arkansas; Regional Haze and Interstate Visibility Transport Federal Implementation Plan; Final Rule, 81 Fed. Reg. 66,332 - 66,421 (September 27, 2016).

Entergy Services, Inc., on behalf of Entergy Arkansas, Inc.
White Bluff Steam Electric Station
Redfield, Arkansas (AFIN 35-00110)

Updated BART Five-Factor Analysis for SO_2 for Units 1 and 2

Submitted to:

Arkansas Department of Environmental Quality (ADEQ)
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August 18, 2017

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1 EXECUTIVE SUMMARY

This report provides an update to the Best Available Retrofit Technology (BART) Five Factor Analysis for sulfur dioxide (SO_2) for Unit 1 (SN-01) and Unit 2 (SN-02) at Entergy Arkansas, Inc.'s (EAI's) White Bluff Steam Electric Station (White Bluff) as well as revising the SO_2 BART conclusion. EAI submitted the original BART Five Factor Analysis to the Arkansas Department of Environmental Quality (ADEQ) on February 21, 2013, with revisions on June 10, 2013 and October 15, 2013.

- Unit 1 (SN-01) is a primary boiler with a maximum net power rating of 850 megawatts (MW) and a nominal heat input capacity of 8,950 million British thermal units per hour (MMBtu/hr). The boiler burns sub-bituminous or bituminous coal[1] as the primary fuel and No. 2 fuel oil or biofuel as a start-up fuel, and it is currently equipped with an electrostatic precipitator (ESP) for particulate matter (PM) control.
- Unit 2 (SN-02) is identical in design to Unit 1. It is a primary boiler with a maximum net power rating of 850 MW and a nominal heat input capacity of 8,950 MMBtu/hr. The boiler burns sub-bituminous or bituminous coal[2] as the primary fuel and No. 2 fuel oil or biofuel as a start-up fuel, and it is currently equipped with an ESP for PM control.

Specific updates incorporated in this version of the report are outlined below.

1.1 REPORT UPDATES

This report includes the following updates to the previous SO_2 Five Factor Analysis for White Bluff Units 1 and 2:

1. Updating the baseline period to 2009-2013.
2. Incorporating new information regarding the remaining useful life (RUL) of the units.
3. Incorporating a new control scenario representing combustion of only low-sulfur coal (LSC).
4. Incorporating additional information (i.e., cost information and modeling results) related to control options involving Dry Sorbent Injection (DSI).
5. Updating all modeling to reflect the newest methodologies for dividing ("speciating") particulate matter (PM or PM_{10})[3] emissions into its constituents.
6. Updating the SO_2 BART conclusion in consideration of the new information and updates listed above.

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[1] The coal-fired units at White Bluff primarily burn sub-bituminous coal, but are permitted to burn bituminous or sub-bituminous coal. Only sub-bituminous coals were burned during the baseline periods evaluated in this analysis.

[2] Ibid.

[3] All PM represented in this report is assumed to have a mass mean diameter smaller than ten microns.

1.2 SUMMARY OF UPDATED BART FIVE FACTOR ANALYSIS

Trinity conducted the below five-step analysis based on EPA's BART Guidelines[4] in 40 CFR Part 51 and other EPA guidance[5] to evaluate SO_2 BART for Units 1 and 2:

1. Identifying all available retrofit control technologies;
2. Eliminating technically infeasible control technologies;
3. Evaluating the control effectiveness of remaining control technologies;
4. Evaluating impacts and documenting the results; and
5. Evaluating visibility impacts.

The updated BART Five Factor Analysis concludes that combustion of LSC constitutes BART for Unit 1 and Unit 2 in light of the updated RUL. The proposed BART emission rate for SO_2 is 0.6 pounds per MMBtu (lb/MMBtu) on a rolling 30-day average.

[4] The BART guidelines were published as amendments to EPA's Regional Haze Rule (RHR) at 40 CFR 51.308 on July 6, 2005.

[5] April 26, 2012, letter from Mr. Guy Donaldson, EPA Region VI, to Mr. Anthony Davis, ADEQ.

2 INTRODUCTION AND BACKGROUND

In the 1977 amendments to the Clean Air Act (CAA), Congress set a national goal to restore national parks and wilderness areas to pristine conditions by preventing any future, and remedying any existing, man-made visibility impairment. On July 1, 1999, the U.S. EPA published the final Regional Haze Rule (RHR). The objective of the RHR is to restore visibility to pristine conditions in 156 specific areas across the United States known as Class I areas. The CAA defines Class I areas as certain national parks (larger than 6,000 acres), wilderness areas (larger than 5,000 acres), national memorial parks (larger than 5,000 acres), and international parks that were in existence on August 7, 1977.

The RHR requires States to set goals that provide for reasonable progress towards achieving natural visibility conditions for each Class I area in their state. On July 6, 2005, the EPA published amendments to its 1999 RHR, often called the Best Available Retrofit Technology (BART) rule, which included guidance for making source-specific BART determinations. The BART rule defines BART-eligible sources as sources that meet the following criteria:

(1) Have potential emissions of at least 250 tons per year of a visibility-impairing pollutant,
(2) Began operation between August 7, 1962, and August 7, 1977, and
(3) Are included as one of the 26 listed source categories in the guidance.

A BART-eligible source is subject to BART if the source is "reasonably anticipated to cause or contribute to visibility impairment in any federal mandatory Class I area." For the purpose of determining which sources are subject to BART, a 1.0 Δdv change or more from an individual source is considered to "cause" visibility impairment, and a change of 0.5 Δdv is considered to "contribute" to impairment, which therefore establishes 0.5 Δdv as a numerical screening threshold for subject-to-BART determinations.[6] According to the BART guidelines, the CALPUFF modeling system (CALPUFF) or any other appropriate dispersion model can be used to predict the visibility impacts.[7] The model-predicted visibility impact, specifically when using CALPUFF the 98th percentile impact measured against natural background (and not the maximum impact), is compared to the 0.5 Δdv threshold to determine if the source is anticipated to cause or contribute to the visibility impairment.[8]

Once it is determined that a source is subject to BART, a BART determination must address air pollution control measures for the source. The visibility regulations define BART as follows:

> *...an emission limitation based on the degree of reduction achievable through the application of the best system of continuous emission reduction for each pollutant which is emitted by...[a BART-eligible source]. The emission limitation must be established on a case-by-case basis, taking into consideration the technology available, the cost of compliance, the energy and non-air quality*

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[6] "Regional Haze Regulations and Guidelines for Best Available Retrofit Technology (BART) Determinations; Final Rule," 70 Fed. Reg. 39,116-18 (July 6, 2005).

[7] Trinity and EAI assert that CALPUFF is not the most appropriate model for estimating visibility impacts. Due to its numerous inherent limitations (e.g., limited chemistry mechanism, distance limitations, blanket background ammonia values, etc.), CALPUFF does not yield reliable results. Furthermore, CALPUFF is no longer an EPA-preferred model, which further indicates CALPUFF's unreliability. More advanced models like the Comprehensive Air Quality Model with Extensions (CAMx)—if processed appropriately—can yield more reliable characterizations of visibility impairment. Nevertheless (without waiver), CALPUFF modeling will continue to be presented in this report for consistency with past submittals.

[8] Id. at 39,163.

environmental impacts of compliance, any pollution control equipment in use or in existence at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology.

The BART Guidelines state that a BART determination should address the following five statutory factors:

1. Existing controls;
2. Cost of controls;
3. Energy and non-air quality environmental impacts;
4. Remaining useful life of the source; and
5. Degree of visibility improvement as a result of controls.

Further, the BART Guidelines indicate that the five basic steps in a BART analysis can be summarized as follows:

1. Identify all available retrofit control technologies;
2. Eliminate technically infeasible control technologies;
3. Evaluate the control effectiveness of remaining control technologies;
4. Evaluate impacts and document the results; and
5. Evaluate visibility impacts.

As described in the above-referenced, previous submittals, the boilers at White Bluff meet the three BART-eligibility criteria, and the existing visibility impairment is modeled at greater than 0.5 Δdv in at least one Class I area. Thus, the White Bluff units are subject to BART.

3 EXISTING EMISSIONS AND BASELINE VISIBILITY IMPAIRMENT

Five Factor Analyses require the determination of unit-specific baseline visibility impairment values to which any post-control scenarios can be compared. The unit-specific baseline modeling analyses are built upon, but are distinguished from, the baseline (a.k.a., "screening") modeling for the collection of BART eligible units at each source that is completed to determine if a BART eligible source is subject to BART. EAI is not updating the subject-to-BART determination at this time.

This section summarizes the baseline visibility impairment attributable to each of White Bluff's units based on CALPUFF air quality modeling conducted by Trinity.[9] Trinity conducted the modeling using the same protocol, methodologies, and inputs (except where specifically updated as described in this report) as presented in the October 15, 2013 submittal. The protocol and details method descriptions are not included with this report because nothing has changed and the CALMET dataset developed per the protocol has been used – and approved by EPA – numerous times since its development.

While this report updates the BART Five Factor Analysis for SO_2 emissions specifically, BART modeling must consider emissions of all visibility-affecting pollutants (VAP), including SO_2, oxides of nitrogen (NO_X), and speciated particulate matter, including filterable coarse particulate matter (PMc), filterable fine particulate matter (PMf), elemental carbon (EC), inorganic condensable particulate matter (IOR CPM) as sulfates (SO_4), and organic condensable particulate matter (OR CPM), also referred to as secondary organic aerosols (SOA).

3.1 BASELINE EMISSION RATES

The updated modeled NO_X and SO_2 emission rates for Unit 1 and Unit 2 are the highest actual 24-hour emission rates based on Clean Air Markets Database (CAMD) data from 2009-2013.[10] The updated modeled PM_{10} emission rates for Unit 1 and Unit 2 are based on emission factors from AP-42 for filterable PM_{10} and condensable PM (with a 99.5 percent control efficiency for ESP applied to the PM_{10} filterable fraction) used in conjunction with the average 2009-2013 coal heating value and ash content (as a percentage of mass).[11] Emission rates for specific PM_{10} species were calculated using the monitored filterable PM rate and the National Park Service (NPS) "speciation spreadsheet" for *Dry Bottom Boiler Burning Pulverized Coal using only ESP*[12] except for SO_4, which was calculated using an Electric Power Research Institute (EPRI) methodology that considers the SO_2 to SO_4 conversion rate and SO_4 reduction factors for various downstream equipment.[13] Table 3-1 summarizes the emission rates that were modeled for SO_2, NO_X, and PM_{10}, including the speciated PM_{10} emissions.

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[9] See footnote 7, above.

[10] The use of this baseline is a conservative approach. EAI would be justified in using a more recent baseline with lower emissions that would result in higher cost effectiveness values.

[11] AP-42, Chapter 1 External Combustion Sources, Section 1.1 Bituminous and Subbituminous Coal Combustion, Table 1.1-5, page 1.1-24 (September 1998).

[12] The baseline speciation is based on the NPS Workbook for a Dry Bottom Boiler burning Pulverized Coal using an ESP. Based on average 2009-2013 values, the following input values were used: heating value of 8,587 Btu/lb, 0.27% sulfur, 4.96% ash, 8,950 MMBtu/hr heat input, and a baseline total PM_{10} emission rate of 119.2 lb/hr at both White Bluff Unit 1 and Unit 2. NPS: http://www.nature.nps.gov/air/Permits/ect/index.cfm.

[13] Electric Power Research Institute (EPRI) Estimating Total Sulfuric Acid Emissions from Stationary Power Plants: EPRI, Technical Update, Palo Alto, CA: March 2012. 1023790.

Table 3-1. Baseline Maximum 24-hour Emission Rates (As Hourly Equivalents)

Unit	SO_2 (lb/hr)	NO_X (lb/hr)	Total PM_{10} (lb/hr)	SO_4 (lb/hr)	PM_c (lb/hr)	PM_f (lb/hr)	SOA (lb/hr)	EC (lb/hr)
SN-01	6,771.9	3,355.4	119.2	5.1	40.4	31.1	9.3	1.2
SN-02	6,622.3	3,590.5	119.2	5.0	40.4	31.1	9.3	1.2

3.2 BASELINE VISIBILITY IMPAIRMENT

Trinity conducted modeling to estimate the current visibility impairment attributable to Unit 1 and Unit 2 in four Class I Areas: Caney Creek Wilderness (CACR), Upper Buffalo Wilderness (UPBU), Hercules Glades Wilderness (HERC), and Mingo Wilderness (MING) using the CALPUFF dispersion model.[14] Table 3-2 provides a summary of the modeled visibility impairment attributable to Unit 1 and Unit 2 based on the emission rates shown in Table 3-1. This table shows the 98th percentile impacts in Δdv and the number of days with impacts greater than 0.5 Δdv.

Table 3-2. Baseline Visibility Impairment

Unit	Year [A]	CACR		UPBU		HERC		MING	
		98th Percentile (Δdv)	No. of Days with Δdv ≥ 0.5	98th Percentile (Δdv)	No. of Days with Δdv ≥ 0.5	98th Percentile (Δdv)	No. of Days with Δdv ≥ 0.5	98th Percentile (Δdv)	No. of Days with Δdv ≥ 0.5
SN-01	2001	1.505	38	1.051	30	0.925	24	0.802	16
	2002	1.306	29	0.742	15	0.567	10	0.708	21
	2003	1.053	32	1.033	24	0.704	15	0.666	14
SN-02	2001	1.533	39	1.059	30	0.912	25	0.819	15
	2002	1.322	29	0.739	16	0.568	11	0.719	20
	2003	1.059	32	1.03	25	0.72	16	0.678	14

[A] Meteorological data year modeled.

[14] Due to an EPA-requested change in meteorological data (to a refined, or "NO OBS = 0", dataset), which excluded the Sipsey Class 1 Area from the modeling domain, Sipsey was not included in this analysis. See also footnote 7 above.

4.1 IDENTIFICATION OF AVAILABLE RETROFIT SO_2 CONTROL TECHNOLOGIES FOR UNIT 1 AND UNIT 2

The boilers burn primarily coal. Sulfur oxides, SO_X, are generated during coal combustion from the oxidation of sulfur contained in the fuel. SO_X emissions are almost entirely dependent on the sulfur content of the fuel and are generally not affected by boiler size or burner design. SO_X emissions from conventional combustion systems are predominantly in the form of SO_2. Since SO_2 is the predominant sulfur compound emitted from Unit 1 and Unit 2, the BART analysis is specific to emissions of SO_2. Reductions in emissions of SO_2 are expected to reduce visibility impairment by reducing sulfate (SO_4) formation.

Step 1 of the top-down control review is to identify available retrofit control options for SO_2. The available SO_2 retrofit control technologies for Unit 1 and Unit 2 are summarized in Table 4-1.

Table 4-1. Available SO_2 Control Technologies for Unit 1 and Unit 2

SO_2 Control Technologies
Fuel Switching – Low-Sulfur Coal (LSC)
Dry Sorbent Injection (DSI)
Dry / Semi-Dry Flue Gas Desulfurization (DFGD), e.g., Spray Dryer Absorber (SDA)
Wet Scrubbing, i.e., Wet Flue Gas Desulfurization (WFGD)

4.2 ELIMINATE TECHNICALLY INFEASIBLE SO_2 CONTROL TECHNOLOGIES FOR UNIT 1 AND UNIT 2

Step 2 of the BART determination is to eliminate technically infeasible SO_2 control technologies that were identified in Step 1.

4.2.1 Fuel Switching - Low-Sulfur Coal

With an achievable emission level of 0.6 lb/MMBtu, switching to LSC can reduce SO_2 emissions by approximately 8.75 percent compared to baseline levels.[15]

4.2.2 Dry Sorbent Injection

DSI involves the injection of a sorbent (e.g., Trona) into the exhaust gas stream where acid gases such as hydrogen chloride (HCl) and SO_2 react with and become entrained in the sorbent. The stream then passes through a particulate control device to remove the sorbent along with the entrained SO_2. The process was developed as a lower cost FGD option because the mixing of the SO_2 and sorbent occurs directly in the exhaust gas stream rather than in a separate vessel. Sorbent injection control efficiency depends on residence time, gas stream temperature, and limitations of the particulate control device.

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[15] Calculated based on a comparison of the maximum 30 boiler operating day SO_2 emission rate during the baseline period to the proposed limit for low-sulfur coal of 0.6 lb/MMBtu.

DSI is a technically feasible yet seldom used technology for moderate to high removal of SO_2 from coal-fired power plants, with limited full-scale installations for SO_2 control. A significant amount of testing of DSI for SO_2 control has been performed in recent years. This testing has shown that a wide range of performance is achievable (up to 80 or 90 percent SO_2 reduction in some cases). However, this testing has also shown that there are many factors that can impact the performance of these reagents, including particle size (milling), residence time, temperature, and the particulate collection equipment. The primary lesson learned through this testing is that each unit is unique, with various factors that can impact the achievable performance or required reagent feed rate. Different performance has even been seen on sister units. Therefore, it is critical to perform a demonstration or Proof of Concept test at each facility.

A demonstration has not to-date been performed on the White Bluff units to show the achievable SO_2 control and associated reagent feed rates. The cost reports developed by S&L, included in Appendix A, show predicted performance and required reagent rates based on Sargent & Lundy's (S&L's) extensive experience with DSI testing and previous work with the White Bluff units. Two DSI technologies are considered for White Bluff: "DSI", which would utilize the existing ESP, and "enhanced DSI", which would include installation of a fabric filter or baghouse. Enhanced DSI should achieve greater SO_2 reductions because the installation of a fabric filter increases residence time and improves collection efficiency to allow more sorbent to be injected. The S&L reports present predicted performance levels (SO_2 emission rates) for DSI and enhanced DSI of 0.35 lb/MMBtu and 0.15 lb/MMBtu, respectively. Because the actual performance and required reagent rates may vary from the predicted values due to unforeseen site-specific conditions, it is possible that the capital and annual costs represented in the S&L reports, and in Section 4.4.2 of this report, could also vary. If a significantly higher injection rate were actually required to achieve the same performance level (SO_2 emission rate) then the capital and annual costs, and corresponding cost-effectiveness of the DSI technologies, could dramatically increase.

Furthermore, DSI has yet to be demonstrated on similarly sized units to those at White Bluff. An important consideration for DSI technology is the design throughput of the system, beyond just the size and achievable performance (SO_2 emission rate). The largest DSI system installed and operating has a design feed rate of 12 tons/hour, while most of the installed systems inject approximately five to six tons/hour. The predicted injection rate for the White Bluff enhanced DSI case is approximately 15 tons/hour. The greater the injection rates, the more issues associated with supply and delivery logistics that arise. At 15 tons/hour (per unit) White Bluff would consume one railcar (100-ton capacity) of Trona every 3.3 hours if both units are operating at full load.

Prior to moving forward with DSI technology as a compliance strategy, a demonstration test would need to be performed to confirm the feasibility, achievable performance and balance of plant impacts (brown plume formation, ash handling modifications, landfill/leachate considerations and impact to mercury control). The balance of plant impacts have been addressed as part of the S&L cost reports based on typical assumptions, but would also be impacted should the design injection rate vary. Any compliance strategy which were to rely on DSI technology would need to be contingent on successful completion of a demonstration test.

4.2.3 Dry / Semi-Dry Flue Gas Desulfurization

Of the various designs for dry or semi-dry FGD systems, the most popular is the Spray Dryer Absorber (SDA) design. In the SDA design, a fine mist of lime slurry is sprayed into an absorption tower where the SO_2 is absorbed by the slurry droplets. The absorption of the SO_2 leads to the formation of calcium sulfite and calcium sulfate within the droplets. The heat from the exhaust gas causes the water to evaporate before the droplets reach the bottom of the tower, resulting in the formation of a dry powder that is carried out with the gas and collected with a fabric filter.

SDA systems can achieve control efficiencies ranging from 60 to 95 percent.[16] SDA is a technically feasible option for control of SO_2 from Unit 1 and Unit 2. Based on a site-specific study completed by S&L, SDA could technically achieve an SO_2 emission rate of 0.06 lb/MMBtu at Unit 1 and Unit 2.

4.2.4 Wet Flue Gas Desulfurization

While WFGD is technically feasible, it is not expected to achieve significant reductions beyond DFGD/SDA and was eliminated in the previous analyses and in EPA's final regulations (SIP approval and FIP). Accordingly, WFGD is not considered further in this analysis.

4.3 RANK OF TECHNICALLY FEASIBLE SO_2 CONTROL OPTIONS BY EFFECTIVENESS FOR UNIT 1 AND UNIT 2

The third step in the BART analysis is to rank the technically feasible options according to their effectiveness in reducing SO_2.
Table 4-2Table 4-2 provides a ranking of the control levels for the controls listed in the previous section.

Table 4-2. Control Effectiveness of Technically Feasible SO_2 Control Technologies

Control Technology	Achievable Emission Rate (lb/MMBtu) [A]
Semi-Dry Scrubber (SDA)	0.06
Enhanced DSI	0.15
DSI	0.35
Low Sulfur Coal	0.6

4.4 EVALUATION OF IMPACTS FOR FEASIBLE SO_2 CONTROLS FOR UNIT 1 AND UNIT 2

The fourth step in the BART analysis is the impact analysis, which evaluates the impacts for the control options deemed feasible in Step 2. This analysis typically is conducted to demonstrate that the most effective control technology does not necessarily constitute BART. The BART guidelines list the four factors to be considered in the impact analysis:

- Cost of compliance
- Energy impacts
- Non-air quality impacts; and
- The RUL of the source

Because the RUL of the source directly affects the cost of compliance, RUL is considered first.

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[16] EPA Basic Concepts in Environmental Sciences, Module 6: Air Pollutants and Control Techniques http://www.epa.gov/eogapti1/module6/sulfur/control/control.htm

4.4.1 Remaining Useful Life

EAI anticipates Unit 1 and Unit 2 will cease to use coal by end of year 2028, and, upon acceptance of the BART determinations contained herein in an approved SIP, is prepared to take an enforceable restriction to this effect.

4.4.2 Cost of Compliance

The capital costs and annual operating and maintenance costs for the considered control options, except for the LSC option, were developed by S&L and are included in Appendix A. The annual cost increase due to burning only LSC is based on a cost premium of $0.50 per ton, which was the premium provided to EAI's fuel purchasing department by its coal suppliers. For the S&L-developed costs, two sets of values are presented. The first, in Table 4-3, is the actual cost estimated for each unit and control option. The second, in Table 4-4Table 4-4, is the estimated cost after excluding cost items that EPA has historically claimed should not be accounted for in BART cost effectiveness calculations. An example of an excluded cost is Allowance for Funds Used During Construction (AFUDC). AFUDC represents the interest expense incurred on the investment in a large capital project, such as a FGD installation, which can take several years to complete (≥ 5 years). Although interest expenses will certainly be incurred on such a project, and AFUDC is typically considered as part of the capital cost of such a project for standard accounting and rate-making purposes, EPA Region 6 has expressed concern with the inclusion of AFUDC and certain other costs. EAI disagrees and believes that determining the cost effectiveness of the control options must realistically reflect the actual cost of compliance. *See* EAI's comments on the proposed FIP.[17] Nonetheless, for completeness, this analysis shows a range of cost effectiveness both including AFUDC and other costs and excluding those costs.

Trinity annualized the capital costs based on capital recovery periods reflecting the total amount of time that the control option could be employed until the unit ceases to use coal at the end of 2028. For the purpose of this report, the start of operation for the SDA option is assumed to be the end of 2021.[18] Therefore, the capital recovery period for SDA is set at seven (7) years (2028 – 2021 = 7 years). The LSC and DSI options can be employed two (2) years earlier than SDA which, for purposes of this report, is assumed to be the end of 2019. Therefore, the capital recovery period for these control options is set at nine (9) years (2028 – 2019 = 9 years).

Trinity determined the values for annual tons of SO_2 reduced by subtracting the estimated controlled annual emission rate from the baseline annual emission rate. The baseline annual emission rate was based on the average rate for the 2009-2013 baseline period.[19] The controlled annual emission rates were based on the lb/MMBtu levels listed in Table 4-2 multiplied by the future annual heat input, which was based on the average actual heat input from CAMD for the 2009-2013 baseline period. For the LSC scenario, "controlled" annual emission rates were based on an 8.75 percent decrease compared to baseline annual emission rates, which is estimated by comparing the maximum 30-boiler operating day rolling average to the controlled emission rate of 0.6 lb/MMBtu.

The cost effectiveness in dollars per ton of SO_2 reduced was determined by dividing the annualized cost of control by the annual tons reduced. Table 4-3 presents a summary of the cost effectiveness for each control

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[17] Entergy Arkansas Inc. "Comments On the Proposed Regional Haze and Interstate Visibility Transport Federal Implementation Plan for Arkansas" (EPA Docket ID No. EPA-R06-OAR-2015-0189), August 7, 2015, pp. 10-11.

[18] October 27, 2021 per 81 Fed. Reg. Vol. 81, p. 66416. However, given that actual installation would take at least five years, SDA likely could not be installed until 2023 or later.

[19] As noted above, this is a conservative baseline, and EAI would have been justified in using a more recent baseline with lower emissions that would have resulted in generally higher cost effectiveness values.

option. The cost of switching to low sulfur coal is less than $1,200/ton of SO_2 reduced. The actual cost effectiveness of the add-on controls is economically infeasible at more than $7,000/ton of SO_2 reduced. It's noted (without waiver) that the cost effectiveness of add-on controls even when excluding certain costs for which EPA has expressed concern (e.g., AFUDC), but that will be incurred as explained above, also results in economic infeasibility, at more than approximately $5,400/ton.[20]

Table 4-3. Summary of SO_2 Controls Cost Effectiveness for Unit 1 and Unit 2 Based on Actual Costs

Unit & Control Option	Baseline Emission Rate (tpy)	Controlled Emission Rate (tpy)	Capital Cost ($MM)	Annualized Capital Cost ($MM/yr)	Annual O&M Cost ($MM/yr)	Average Cost Effective-ness ($/ton)	Incremental Cost Effective-ness v. LSC ($/ton)
SN-01 – LSC	15,939	14,544	0	0	1.60	1,150	
SN-02 – LSC	16,034	14,631	0	0	1.61	1,148	
SN-01 – DSI	15,939	9,770	190.11	29.18	14.91	7,148	8,900
SN-02 – DSI	16,034	9,807	190.11	29.18	14.91	7,081	8,807
SN-01 – Enhanced DSI	15,939	4,187	393.74	60.44	26.19	7,372	8,209
SN-02 – Enhanced DSI	16,034	4,203	393.74	60.44	26.19	7,322	8,153
SN-01 – SDA	15,939	1,675	495.74	92.01	9.60	7,124	7,771
SN-02 – SDA	16,034	1,681	495.74	92.01	9.60	7,080	7,722

Table 4-4. Summary of SO_2 Controls Cost Effectiveness for Unit 1 and Unit 2 Based on Costs Adjusted for EPA-Exclusions for Illustration Purposes

Unit & Control Option	Baseline Emission Rate (tpy)	Controlled Emission Rate (tpy)	Capital Cost ($MM)	Annualized Capital Cost ($MM/yr)	Annual O&M Cost ($MM/yr)	Average Cost Effective-ness ($/ton)	Incremental Cost Effective-ness v. LSC ($/ton)
SN-01 – LSC	15,939	14,544	0	0	1.60	1,150	
SN-02 – LSC	16,034	14,631	0	0	1.61	1,148	
SN-01 – DSI	15,939	9,770	154.79	23.76	14.91	6,269	7,764
SN-02 – DSI	16,034	9,807	154.79	23.76	14.91	6,211	7,683
SN-01 – Enhanced DSI	15,939	4,187	321.42	49.34	26.19	6,427	7,137
SN-02 – Enhanced DSI	16,034	4,203	321.42	49.34	26.19	6,384	7,088
SN-01 – SDA	15,939	1,675	364.83	67.71	9.60	5,420	5,883
SN-02 – SDA	16,034	1,681	364.83	67.71	9.60	5,387	5,846

[20] Issues raised on appeal of the federal plan include EPA's use of undervalued cost of controls. However, without waiver of any claims or arguments, EPA's estimates also support the conclusion that SDA is not cost effective. Using EPA's estimates of capital cost ($247,709,875), total O&M cost ($16,877,127), and emissions reductions (14,363 tpy for Unit 1 and 15,221 tpy for Unit 2), adjusted only to consider the shortened remaining useful life value discussed above, the average cost effectiveness values for SDA are $4,376/ton for Unit 1 and $4,129 for Unit 2.

4.4.3 Energy Impacts and Non-Air Quality Impacts

There are numerous energy impacts and adverse non-air quality environmental impacts associated with the add-on controls under consideration. Some examples related to the use of DSI include (a) the need for substantial storage and transportation – both delivery via rail and conveyance on site – of Trona, (b) the forced abandonment of the beneficial re-use of fly ash, and (c) potential negative impacts on the PM control device.[21] These impacts are more fully addressed for all the considered control options in the S&L reports included in Appendix A.

4.5 EVALUATION OF VISIBILITY IMPACT OF FEASIBLE SO_2 CONTROLS FOR UNIT 1 AND UNIT 2

Trinity conducted an impact analysis to assess the visibility improvement achieved. The impact analysis compared the impacts associated with the baseline emission rates to the impacts associated with the maximum emission rates representative of each control option.

Table 4-5 summarizes the lb/hr emission rates that were modeled to reflect each control option. The NO_X and total PM_{10} emission rates were modeled at the revised 2009-2013 baseline rates. The applicable NPS speciation spreadsheets were relied upon to determine emission rates for PM species.[22,23,24] SO_4 emission rates were independently calculated using an EPRI methodology that considers the SO_2 to SO_4 conversion rate and SO_4 reduction factors for various downstream equipment.[25]

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[21] Sargent & Lundy, *Entergy Arkansas, Inc. White Bluff DSI Cost Estimate Basis Document*, SL-014000 Final, Rev. 0, August 3, 2017, pp. 6-10. *See* Appendix A of this report.

[22] Low sulfur coal PM speciation is based on the NPS Workbook for a Dry Bottom Boiler burning Pulverized Coal using an ESP. The following values were input: heating value of 8,587 Btu/lb, 0.27% sulfur, 4.96% ash, 8,950 MMBtu/hr heat input, and a baseline total PM_{10} emission rate of 119.2 lb/hr at White Bluff Unit 1 and Unit 2. NPS: http://www.nature.nps.gov/air/Permits/ect/index.cfm.

[23] DSI and Enhanced DSI PM speciations are based on the NPS workbooks for a Dry Bottom Boiler burning Pulverized Coal using an FGD system with an ESP or Fabric Filter. The following values were input: heating value of 8,587 Btu/lb, 0.27% sulfur, 4.96% ash, 8,950 MMBtu/hr heat input, and a baseline total PM_{10} emission rate of 119.2 lb/hr at White Bluff Unit 1 and Unit 2. NPS: Ibid.

[24] DFGD speciation is based on the NPS workbook for a Dry Bottom Boiler burning Pulverized Coal using an FGD system with a Fabric Filter. The following values were input: heating value of 8,587 Btu/lb, 0.27% sulfur, 4.96% ash, 8,950 MMBtu/hr, and a baseline total PM_{10} emission rate of 119.2 lb/hr at White Bluff Unit 1 and Unit 2. NPS: Ibid.

[25] Electric Power Research Institute (EPRI) Estimating Total Sulfuric Acid Emissions from Stationary Power Plants: EPRI, Technical Update, Palo Alto, CA: March 2012. 1023790.

Table 4-5. Emission Rates Modeled to Reflect SO_2 Controls for Unit 1 and Unit 2

Unit & Control Option	SO_2 (lb/hr)	SO_4 [A] (lb/hr)	NO_X (lb/hr)	PM_C (lb/hr)	PM_F (lb/hr)	EC (lb/hr)	SOA (lb/hr)	Total PM_{10} (lb/hr)
SN-01 – LSC	5,370.0	4.0	3,355.4	40.4	31.1	1.2	9.3	119.2
SN-02 – LSC	5,370.0	4.0	3,590.5	40.4	31.1	1.2	9.3	119.2
SN-01 – DSI	3,132.5	0.5	3,355.4	29.0	22.4	0.9	13.4	119.2
SN-02 – DSI	3,132.5	0.5	3,590.5	29.0	22.4	0.9	13.4	119.2
SN-01 – Enhanced DSI	1,342.5	0.02	3,355.4	13.4	12.9	0.5	18.5	119.2
SN-02 – Enhanced DSI	1,342.5	0.02	3,590.5	13.4	12.9	0.5	18.5	119.2
SN-01 – SDA	537.0	0.01	3,355.4	13.4	12.9	0.5	18.5	119.2
SN-02 – SDA	537.0	0.01	3,590.5	13.4	12.9	0.5	18.5	119.2

[A] SO_4 as it is displayed in this table represents ammonium sulfate.

Comparisons of the existing/baseline visibility impacts and the post-control visibility impacts are provided in Table 4-6 and Table 4-7.

Table 4-6. Summary of CALPUFF-Modeled Visibility Impacts from SO_2 Controls for Unit 1 (Across All Modeled Years, 2001-2003)

Scenario	CACR		UBPU		HERC		MING	
	98% Impact (Δdv)	# Days > 0.5 Δdv	98% Impact (Δdv)	# Days > 0.5 Δdv	98% Impact (Δdv)	# Days > 0.5 Δdv	98% Impact (Δdv)	# Days > 0.5 Δdv
Baseline	1.505	99	1.051	69	0.925	49	0.802	51
LSC	1.376	89	0.908	54	0.758	34	0.687	40
Improvement over baseline	*0.129*	*10*	*0.143*	*15*	*0.167*	*15*	*0.115*	*11*
DSI	1.197	64	0.676	30	0.584	19	0.469	17
Improvement over baseline	*0.308*	*35*	*0.375*	*39*	*0.341*	*30*	*0.333*	*34*
Improvement over LSC	*0.179*	*25*	*0.232*	*24*	*0.174*	*15*	*0.218*	*23*
Enhanced DSI	1.013	41	0.496	14	0.458	11	0.366	6
Improvement over baseline	*0.492*	*58*	*0.555*	*55*	*0.467*	*38*	*0.436*	*45*
Improvement over LSC	*0.363*	*48*	*0.412*	*40*	*0.300*	*23*	*0.321*	*34*
Improvement over DSI	*0.184*	*23*	*0.180*	*16*	*0.126*	*8*	*0.103*	*11*
SDA	0.902	35	0.409	7	0.400	6	0.298	2
Improvement over baseline	*0.603*	*64*	*0.642*	*62*	*0.525*	*43*	*0.504*	*49*
Improvement over LSC	*0.474*	*54*	*0.499*	*47*	*0.358*	*28*	*0.389*	*38*
Improvement over DSI	*0.295*	*29*	*0.267*	*23*	*0.184*	*13*	*0.171*	*15*
Improvement over Enhanced DSI	*0.111*	*6*	*0.087*	*7*	*0.058*	*5*	*0.068*	*4*

Table 4-7. Summary of CALPUFF-Modeled Visibility Impacts from SO_2 Controls for Unit 2 (Across All Modeled Years, 2001-2003)

Scenario	CACR		UBPU		HERC		MING	
	98% Impact (Δdv)	# Days > 0.5 Δdv	98% Impact (Δdv)	# Days > 0.5 Δdv	98% Impact (Δdv)	# Days > 0.5 Δdv	98% Impact (Δdv)	# Days > 0.5 Δdv
Baseline	1.533	100	1.059	71	0.912	52	0.819	49
LSC	1.436	89	0.932	55	0.775	35	0.697	41
Improvement over baseline	*0.097*	*11*	*0.127*	*16*	*0.137*	*17*	*0.122*	*8*
DSI	1.259	66	0.700	31	0.609	19	0.486	18
Improvement over baseline	*0.274*	*34*	*0.359*	*40*	*0.303*	*33*	*0.333*	*31*
Improvement over LSC	*0.177*	*23*	*0.232*	*24*	*0.166*	*16*	*0.211*	*23*
Enhanced DSI	1.073	42	0.528	17	0.483	12	0.384	7
Improvement over baseline	*0.460*	*58*	*0.531*	*54*	*0.429*	*40*	*0.435*	*42*
Improvement over LSC	*0.363*	*47*	*0.404*	*38*	*0.292*	*23*	*0.313*	*34*
Improvement over DSI	*0.186*	*24*	*0.172*	*14*	*0.126*	*7*	*0.102*	*11*
SDA	0.959	37	0.427	12	0.426	8	0.318	3
Improvement over baseline	*0.574*	*63*	*0.632*	*59*	*0.486*	*44*	*0.501*	*46*
Improvement over LSC	*0.477*	*52*	*0.505*	*43*	*0.349*	*27*	*0.379*	*38*
Improvement over DSI	*0.300*	*29*	*0.273*	*19*	*0.183*	*11*	*0.168*	*15*
Improvement over Enhanced DSI	*0.114*	*5*	*0.101*	*5*	*0.057*	*4*	*0.066*	*4*

4.6 BART FOR SO_2 FOR UNIT 1 AND UNIT 2

Based on the costs of the control options listed above, BART for Unit 1 and Unit 2, when considering the updated RUL, would be an emission level of 0.6 lb/MMBtu based on the use of low-sulfur coal.

APPENDIX A. CONTROL COST INFORMATION

SO_2 CONTROL COST INFORMATION – LAST UPDATED AUGUST 2017

APPENDIX B. BASELINE VISIBILITY IMPAIRMENT BY POLLUTANT

Table B-8. Baseline Visibility Impairment Attributable to Unit 1 by Pollutant

Year	Maximum (Δdv)	98th Percentile (Δdv)	No. of Days with Δdv ≥ 0.5	98th Percentile % SO_4	98th Percentile % NO_3	98th Percentile % PM_{10}	98th Percentile % NO_2
Caney Creek							
2001	2.912	1.505	38	74.33	25.34	0.17	0.15
2002	2.048	1.306	29	61.53	34.59	0.83	3.04
2003	4.020	1.053	32	47.92	50.35	0.35	1.39
Upper Buffalo							
2001	2.089	1.051	30	68.58	31.17	0.26	0.00
2002	1.438	0.742	15	79.11	20.19	0.37	0.32
2003	1.773	1.033	24	79.79	19.92	0.28	0.00
Hercules Glades							
2001	1.643	0.925	24	90.21	9.56	0.23	0.00
2002	1.184	0.567	10	74.20	25.45	0.25	0.10
2003	1.977	0.704	15	86.02	13.73	0.25	0.00
Mingo							
2001	1.538	0.802	16	51.46	48.03	0.39	0.12
2002	0.898	0.708	21	54.87	44.82	0.31	0.01
2003	1.003	0.666	14	57.31	41.18	0.41	1.11

Table B-9. Baseline Visibility Impairment Attributable to Unit 2 by Pollutant

Year	Maximum (Δdv)	98th Percentile (Δdv)	No. of Days with Δdv ≥ 0.5	98th Percentile % SO_4	98th Percentile % NO_3	98th Percentile % PM_{10}	98th Percentile % NO_2
Caney Creek							
2001	2.994	1.533	39	36.23	60.75	0.74	2.28
2002	2.098	1.322	29	59.43	36.53	0.82	3.22
2003	4.084	1.059	32	96.37	3.38	0.24	0.01
Upper Buffalo							
2001	2.066	1.059	30	66.54	33.21	0.26	0.00
2002	1.447	0.739	16	77.57	21.71	0.37	0.35
2003	1.791	1.030	25	78.24	21.46	0.28	0.00
Hercules Glades							
2001	1.665	0.912	25	89.39	10.38	0.23	0.00
2002	1.185	0.568	11	72.38	27.26	0.25	0.11
2003	1.947	0.720	16	40.35	58.44	0.40	0.82
Mingo							
2001	1.580	0.819	15	81.62	17.93	0.33	0.12
2002	0.886	0.719	20	58.93	40.66	0.19	0.22
2003	0.999	0.678	14	55.08	43.36	0.40	1.17

APPENDIX C. REFINED PM SPECIATION CALCULATIONS

Message

From: Elliott, Don [DElliott@cov.com]
Sent: 7/28/2017 3:06:14 PM
To: Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]
Subject: FW: MGP - Diageo Motion to Dismiss - Summary of Prior Studies of Effect on Product Quality
Attachments: Diageo Motion to Dismiss.18-1.pdf; 2000 OAR Letter.pdf; Elliott Letter to Tennenbaum.5 25 17.pdf

Justin -

Here is my latest communication to Phillip Brooks, with Bill Wherum's *Diageo* motion listing the numerous prior experiments to control "angel's share" emissions of alcohol during whiskey aging attached. The email is also worth reading, as I ask Phill to confirm that Gallo is telling the Region 5 engineer the same thing they are telling us, namely, that there WAS an adverse effect on their product in the latest experiment (the 13th by my count). I have not heard back from Phil on that.

For convenience, I also include the 2000 OAR letter from headquarters, which Region 5 claims doesn't bind them because they staked out their own contrary position in 1996, contradicting Region IV's position which goes back to 1994.

I also include my prior letter from May 26 to the Region, which goes over this history, including the 1978 EPA study, so you will have it readily at hand.

Do let me know if you have any questions or want any more info on this.

Don

From: Elliott, Don
Sent: Wednesday, July 19, 2017 12:53 PM
To: Brooks.Phillip@epa.gov
Subject: MGP - Diageo Motion to Dismiss - Summary of Prior Studies of Effect on Product Quality

Settlement Communication

Phill,

As discussed, the attached Diageo motion to dismiss (written by Bill Wehrum) provides a good summary of prior studies of the effect on product quality of controls on whiskey aging warehouse on pages 5-11. As you'll see, controls on whiskey aging warehouses have been tried many times for roughly 30 years, and they have always resulted in significant adverse effects on product quality. I have all the individual studies cited as exhibits to the motion if you want any of them. It is also my understanding that Chris Savage of Gallo told Marie St. Peter of Region 5 recently, as they have been telling us all along, that their experiment on brandy also *did* have an adverse effect on product quality. (Please do let me know whether that was also her understanding of the conversation, as it will be helpful if we can come to a joint understanding of the facts.)

Tony and I both appreciated your attempts to find a possible compromise approach involving the existing emergency ventilation systems on our call on Monday. I am not yet in a position to advise you of the company's position on that because the key guy (Dave Rindom, MGP's Chief Administrative Officer) is out of the country on business and I won't be able to speak with him until July 31. But just speaking for myself, I want you to understand what a hard lift it would be for the company to consider such an approach. As I have tried to express from the very beginning of our conversations, the company is very reluctant to be perceived by its customers in the rest of the industry as conducting a test or setting a precedent that would adversely affect others.

I also need to correct one inadvertent misstatement I made on the call. I stated incorrectly based on the information that I had at the time that MGP had its own product in those basement areas. That is true as far as it goes, but it also turns out on further inquiry that they are also aging product in some of the basement areas that is destined for others. I am told that the total value of the product that would be at risk in the three basements is approximately $48 million, as there are 16,000 barrels in each of the three basements or 48,000 barrels in total. I am also told that MGP's customers are "voting with their feet" and thereby revealing their very sincere concern about adverse effects on product quality by threatening to remove their product from MGP if we agree to anything like what we have been discussing.

I am not saying any of these issues are necessarily insuperable. I won't know that until after July 31 when I have a chance to discuss all of this with the company, but I did want to share these issues with you as things we need to be thinking about as we'd have to deal with them somehow.

Best,

Don

E. Donald Elliott

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COVINGTON

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT 23 2000

OFFICE OF
AIR AND RADIATION

The Honorable Robert C. Smith
Chairman, Committee on Environment
& Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter is in response to your question as to whether the Environmental Protection Agency (EPA) has identified reasonably available control technology (RACT) for ethanol emissions from alcohol beverage aging warehouses. One control technology which has been suggested in this regard is carbon adsorption which conceivably could be applied to the warehouse ventilation exhaust to capture ethanol fumes. However, in order to capture the warehouse fumes it may be necessary to modify the air flowing through the warehouse which could affect temperature, humidity and ventilation in the warehouse. The industry has raised questions about whether these changes would adversely affect the product quality.

Due to this unresolved issue, EPA has not, at this time, declared that such add-on control devices are RACT for alcohol beverage aging warehouses. Nor has EPA currently identified any other available technology which it considers to be RACT for alcohol beverage aging warehouses. Therefore, EPA is not requiring states to control these sources in order to meet ozone control state implementation plan requirements.

I appreciate this opportunity to be of service and trust that this information will be helpful to you.

Sincerely,

John C. Beale
Deputy Assistant Administrator
for Air and Radiation

cc: The Honorable Max Baucus

EXHIBIT
Witness
10

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

BRUCE MERRICK, et al.	)	
	)	
Plaintiffs	)	
	)	**Civil Action No.**
v.	)	**3:12-CV-334-CRS**
	)	
DIAGEO AMERICAS SUPPLY, INC.	)	
	)	
Defendant	)	

MEMORANDUM OF DIAGEO AMERICAS SUPPLY, INC. IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Defendant Diageo Americas Supply, Inc. ("Diageo"), by counsel, tenders this memorandum in support of its Motion to Dismiss Plaintiffs' First Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6). As demonstrated below, Plaintiffs' allegation that Diageo has failed to use emission control technology to reduce ethanol emissions from its whiskey aging warehouses is an essential element of all of their causes of action. But Plaintiffs do not allege a specific source for the alleged duty to use emission controls. And as the Court may determine by taking judicial notice of EPA decisions, agency actions from other jurisdictions, Diageo's Jefferson County permits and other relevant public records, no such duty exists. Although Plaintiffs allege that Diageo has been "cited" by the Louisville Metro Air Pollution Control District with regard to a leased warehouse facility, the alleged citation is merely a Notice of Violation Letter, and not a final order of the agency; as such, it has no legal force or effect. Nor do Plaintiffs allege any factual basis for the relief they demand, *i.e.*, a mandatory permanent injunction requiring Diageo to use emission control technology in its Kentucky whiskey aging warehouses that carries a substantial risk of ruining the entire whiskey stock, including all of its currently aging Kentucky bourbon. Because Plaintiffs' allegations are conclusory and

speculative, they must be disregarded, and the remaining factual allegations of the First Amended Complaint fail to state a claim upon which relief can be granted.

BACKGROUND

1. Nature of action.

This is a putative class action filed by seven plaintiffs who own, rent or lease real property located in the City of Shively, in Jefferson County, Kentucky. Plaintiffs allege that ethanol emissions from Diageo's whiskey aging warehouses have catalyzed the growth of an "unsightly mold" that allegedly blackens exterior surfaces on their property. Although Plaintiffs acknowledge the "mold" can be removed by high-pressure washing or with bleach (First Amended Complaint ¶ 33), they seek money damages, punitive damages and injunctive relief against Diageo. *Id.*, Prayer for Relief. Diageo is the sole defendant in this action.[1]

Plaintiffs assert five causes of action, all of which are limited to claims for alleged property damage: (1) negligence/gross negligence, (2) temporary nuisance, (3) permanent nuisance, (4) trespass, and (5) injunctive relief. *See generally* Amended Complaint, ¶¶ 68-141.

2. Plaintiffs' allegations concerning emission control technology.

Plaintiffs claim that Diageo has breached a duty that it does not actually have, and seek a remedy that does not actually exist, to accomplish a goal that (even if Plaintiffs' arguments on causation were credited) could not be achieved without endangering or destroying Diageo's Kentucky whiskey business.

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[1] Plaintiffs and several others have asserted identical claims against Brown-Forman Corporation and Heaven Hill Distillers, Inc. in a civil action filed in the Jefferson Circuit Court. *See Merrick, et al. v. Brown-Forman Corporation et al.*, Civil Action No. 12-CI-03382 (Jefferson Circuit Court, Division 9), and their counsel has asserted such claims on behalf of other plaintiffs in a civil action filed in the Franklin Circuit Court against Buffalo Trace Distillery, Inc. and Beam, Inc. *See Mills v. Buffalo Trace Distillery, Inc., et al.*, Civil Action No. 12-CI-00743 (Franklin Circuit Court, Division II).

Central to Plaintiffs' claims is the allegation that Diageo has breached an alleged duty to utilize "emission control technology to reduce the ethanol emitted during its alcoholic beverage production operations," including, in particular, the storage of whiskey in oak barrels in Diageo's aging warehouses. *See* First Amended Complaint, ¶ 23. In this regard, Plaintiffs allege:

> 18. Defendant is engaged in the commercial production of alcoholic beverages.
>
> 19. As a result of Defendant's alcoholic beverage production operations in Kentucky, including specifically during fermentation, distillation, aging/warehousing and bottling stages of alcoholic beverage production, significant, uncontrolled ethanol emissions occur.
>
> 20. During the aging process between 6 to 10 pounds of ethanol will evaporate from a 50-gallon charred oak barrel.
>
> 21. Because the Defendant fails to capture and control the ethanol it produces it discharges thousands of tons of ethanol into the atmosphere of the surrounding community.
>
> * * *
>
> 23. Defendant has not adopted emission control technology to reduce the ethanol emitted during its alcoholic beverage production operations.
>
> 24. Reasonable and cost effective emissions control technology exists.

First Amended Complaint, ¶¶ 18-21, 23-24.

After alleging that Diageo has breached an alleged duty to utilize "emission control technology" in its whiskey aging warehouses, Plaintiffs demand that the Court issue a mandatory permanent injunction requiring Diageo to install and use emission control technology in its whiskey warehouses. *See* First Amended Complaint, ¶¶ 118-40. Indeed, Plaintiffs go so far as to ask that Diageo be ordered to use a particular emission control technology called regenerative thermal oxidizers ("RTO"). *Id.*, ¶¶ 118-37.

Tellingly, Plaintiffs do not (and cannot) allege the existence of any state or federal statute or regulation, local ordinance or other law requiring Diageo (or any other whiskey distiller in the United States) to capture and control ethanol emissions from its aging warehouses, much less to employ RTO technology. *Id.*; *see generally* First Amended Complaint, ¶¶ 18-24, 38-45, 69-79, 86-87, 90-91, 97, 106, 118-37 and 139-40. And even though Diageo operates in a highly regulated industry, with its Jefferson County, Kentucky operations governed by the terms of United States Environmental Protection Agency ("EPA")-enforceable permits issued by the Louisville Metro Air Pollution Control District ("District"), *see* section 4, *infra*, Plaintiffs do not (and cannot) allege that any of Diageo's permits require the capture and control of ethanol emissions from Diageo's whiskey aging warehouses. *Id.*

Nor do Plaintiffs cite any decision of any court or administrative agency that has required Diageo or any other whiskey distiller to use emission control technology in its whiskey aging warehouses or that has required the use of RTO in whiskey aging warehouses. *Id.* Similarly, Plaintiffs do not allege that capture and control technologies have been used successfully in Diageo's Kentucky whiskey aging warehouses or in any other whiskey aging warehouse. Nor do Plaintiffs allege that such technologies would successfully capture ethanol emissions in Diageo's whiskey aging warehouses without changing such critical factors as natural air flow, temperature and humidity inside the warehouses and without adversely affecting the quality of the finished product. *Id.*

Instead of making specific factual allegations concerning emission capture and control technology (RTO or otherwise) in whiskey aging warehouses, Plaintiffs allege that certain brandy manufacturers in California capture ethanol from brandy warehouses and control them with RTO. *Id.*, ¶¶ 119–134. This leads Plaintiffs to conclude that "[t]he experience of the brandy

makers in California demonstrates that [RTO] technology is available, affordable, and effective." *Id.*, ¶ 134. But Plaintiffs allege no facts regarding *whiskey aging* in support of this generalized proposition.

Thus, Plaintiffs seek to pursue a class action complaint on behalf of "hundreds" of class members, *Id*, ¶ 63, seeking money damages (including punitive damages) and a mandatory permanent injunction requiring Diageo to use emission control technology in its whiskey aging warehouses, even though such technology has never been required or used for whiskey aging warehouses. Such technology would put Diageo's entire Kentucky whiskey inventory at risk, including whiskey that has been aging for many years in the traditional warehouse environment. And Plaintiffs base this demand on nothing more than the unsupported, conclusory and speculative allegation that what may work for brandy manufacturers in California will necessarily work (without adversely affecting the final product) for whiskey aging warehouses in Jefferson County, Kentucky.

3. The EPA's position regarding emissions from whiskey aging warehouses.

Plaintiffs' allegations concerning RTO are not just merely conclusory and speculative; they are contrary to the position of the federal EPA and contrary to the position of the California agency on which they rely for their RTO claims. Although Plaintiffs allege that "[t]he experience of the *brandy* makers in California demonstrates that [RTO] technology is available, affordable, and effective," *Id.*, ¶ 134 (emphasis added), they fail to disclose that the California agency expressly found that RTO technology was *not* applicable to *whiskey* aging. Like the EPA and other agencies for the past 35 years, the California agency recognized that whiskey making depends on the conditions (and most importantly, the natural air flow) surrounding oak aging barrels during the aging process, that capturing emissions changes those conditions, and that the

changes adversely affect the whiskey. *See infra.* The EPA and states long have recognized this fact and consistently have acknowledged that *no technology exists* for capturing and controlling ethanol emissions from whiskey aging without damaging or risking damage to the product. *Id.*

Ethanol is an emission regulated under the federal Clean Air Act, 42 U.S.C. §7401 *et. seq.*, and regulations promulgated by Kentucky and Louisville Metro.[2] Ethanol is grouped with other volatile organic compounds ("VOCs") for regulation, and the EPA and all states where whiskey aging takes place have had to consider ethanol emissions from whiskey aging in two contexts. The first is in determining the type of air pollution control permit required to operate a whiskey aging warehouse. That turns on whether ethanol emissions from the warehouse are "fugitive emissions." The second is in determining if reasonably available control technology exists for capturing and reducing some portion of those emissions. Both issues turn on the same question, namely, can any reasonably available technology actually capture and control ethanol emitted from oak barrels while whiskey is aging? As determined by every regulatory agency to date, the answer is no, because all technologies that have been tried actually damage the whiskey.

In one of several studies on the subject of emission controls in whiskey aging warehouses, the EPA noted:

> In aging or maturation, the rate of extraction of wood constituents, transfer, and reaction depend on both ambient conditions such as temperature and humidity and the concentrations of various whisky constituents. For instance, higher temperatures increase the rate of extraction, transfer by diffusion, and reaction. Diurnal and seasonal temperature changes also cause convection currents in the liquid and pressure changes in the gas affecting transfer. The rate of diffusion will depend upon the difference in concentrations of constituents in the wood, liquid, and air blanketing the barrel. The

[2] *See* 401 KAR 50:010(135) (adopting by reference 40 CFR §51.100(s)) and Louisville Metro Air Pollution Control District Regulation 1.02, Section 1.74. Copies of authorities not available electronically are attached.

> rates of reaction will increase or decrease with the concentration of constituents. *Thus, changes in the airflow around the barrel would change the alcohol concentration around the barrel and impact the diffusion rate. All of these variables are integral to a particular product brand which will have its own unique taste, color, and aroma. According to the 1978 EPA report, when ventilation was artificially increased, the quality of the product was greatly impaired.*

Emission Factor Documentation for AP-42, Section 9.12.3 Distilled Spirits, US Environmental Protection Agency, Office of Air Quality Planning and Standards (March 1997) p. 2-8 (emphasis added).[3]

The Clean Air Act requires permits for a number of activities that cause or increase certain emissions. Whether those permits are required often depends on whether the emissions are "fugitive emissions." For example Title V, added as part of the Clean Air Act Amendments of 1990,[4] requires any facility that is major source of certain emissions to obtain a federally enforceable operating permit.[5] Whether a facility is a major source turns on its potential to emit such emissions, and when calculating that potential for this type of facility, the facility's fugitive emissions are not included.[6] Both federal and Louisville Metro Air Pollution Control District ("District")[7] regulations that specify which sources require a Title V permit[8] define "fugitive

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[3] A court may properly take judicial notice of public records and government documents, FRE 201, and may consider this information without converting a motion to dismiss into a motion for summary judgment. *See Ashland, Inc. v. Oppenheimer & Co.*, 648 F.3d 461, 467 (6th Cir. 2011) (in addition to the allegations in the complaint, the court may also consider matters subject to judicial notice when considering motions to dismiss); *Bassett v. NCAA*, 528 F.3d 426, 430 (6th Cir. 2008) (same). *See also Papasan v. Allain*, 478 U.S. 265, 268 n.1, 106 S. Ct. 2932, 92 L.Ed.2d 209 (1986) ("Although this case comes to us on a motion to dismiss under Federal Rule of Civil Procedure 12(b), we are not precluded in our review of the complaint from taking notice of items in the public record . . . ."). Copies of all public records cited herein are attached.

[4] P.L. 101-549, §§ 501-507 (Nov. 10, 1990).

[5] 42 U.S.C. §7661- 7661f.

[6] *See e.g.,* Louisville Metro Air Pollution Control District Regulation 2.16, Section 1.25.2.

[7] The District is the air pollution control agency recognized by EPA as having responsibility and authority for

emissions" to mean "those emissions that could not reasonably pass though a stack, chimney, vent, or other functionally-equivalent opening,"[9] *i.e.*, emissions that cannot be reasonably collected. While the District and the Kentucky Division of Air Quality readily accepted that whiskey-aging emissions are fugitive emissions,[10] the question was litigated in the Indiana Office of Environmental Adjudication when Seagram & Sons appealed an Indiana Department for Environmental Management decision to subject ten Seagram whiskey aging warehouses in Ripley County to a Part 70 permit. *See In re: Objection to the Issuance of Part 70 Operating Permit No. T-137-6928-00011 for Joseph E. Seagram & Sons., Ripley County, Indiana,* 2004 OEA 58 (03-AZ-J-3003) (August 4, 2004). Holding that "whether the emissions can be reasonably *collected* is essential to the determination of whether the emissions are fugitive," the OEA focused entirely on the question of reasonable collection. *In re: Joseph E. Seagram & Sons* at ¶ 9 (emphasis added). Finding that whiskey-aging emissions are fugitive, the OEA wrote:

> Petitioner has presented extensive evidence regarding the whiskey aging process and the effect the collection of ethanol emissions would have on this process. The Petitioner has shown by a preponderance of the evidence that the collection of the ethanol emissions would negatively affect product quality. The Petitioner has also presented sufficient evidence to prove that such emissions are not collected at other facilities and that U.S. EPA has not identified any reasonably available control technology (RACT) for ethanol emissions from alcohol beverage aging warehouses.

Id. at ¶ 21. Thus, the OEA found that "emissions from [Seagram & Sons' whiskey aging

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implementing requirements within Louisville Metro that the Clean Air Act requires of states. *See* 40 CFR Part 52, Subpart S.

[8] Title V permits are sometimes referred to as Part 70 Permits because EPA regulations that implement the Title V requirements are codified at 40 CFR Part 70.

[9] 40 CFR §70.2 and Louisville Metro Air Pollution Control District Regulation 2.16, Section 1.20.

[10] *See* June 27, 1994 letter from Kentucky Division of Air Quality Director, John Hornback, and July 1, 1994 letter from District Chief Engineer, R.M. Everhart.

warehouses] are fugitive emissions" because they cannot reasonably be captured. *Id.* at ¶ 22.

Reasonably available control technology ("RACT")[11] requirements in the Clean Air Act also have caused the EPA and states to assess whether whiskey or rum aging emissions can be captured and controlled. The Clean Air Act requires that states with nonattainment areas[12] impose on major sources within those areas a requirement to use, at a minimum, RACT to control their emissions.[13] The EPA has looked at whiskey aging emissions for many years and has yet to identify any reasonably available control technology for those emissions, largely because capturing the emissions would impair the aging process. Indeed, as the OEA noted in *In re: Joseph E. Seagram & Sons, supra,* the EPA's Deputy Assistant Administrator for Air and Radiation acknowledged this in an October 23, 2000 letter to Senator Robert Smith, Chairman of the Senate Committee on Environment and Public Works. *See In re: Joseph E. Seagram & Sons, supra*, ¶ 7(f).

The EPA also accepted this conclusion in 2001 when it approved Maryland's proposed requirements on a Seagram & Sons rum production facility in the state. RACT obligations are imposed on a case-by-case basis through permits or by regulation, and in 2001 Maryland decided to adopt a regulation to define RACT requirements for distilled spirits facilities. The only facility affected by the Maryland rule is operated by Seagram & Sons to produce rum, a distilled spirit that, like whiskey, is aged in oak barrels. When formulating this RACT rule, Maryland recognized the fundamentals of aging distilled spirits, and how a requirement to change air flows

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[11] The phrase "reasonably available control technology" is interpreted by the EPA to mean the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility. 44 Fed. Reg. 53762 (Sept. 17, 1979).

[12] A "nonattainment area" is a geographic area identified though ambient air monitoring to have contaminant levels that exceed a national ambient air quality standard. 42 U.S.C. §§7501(2) and 7407(d).

[13] 42 U.S.C. §§7502(c)(1) and 7511a(b)(2).

will damage the product. In its Technical Support Document developed to support this RACT rule the Maryland Department for the Environment noted:

> The VOC from the aging operation is released as fugitive emissions and is caused by the breathing of the barrels. The reaction within the barrel and the breathing are part of the aging cycle. Interference with the breathing of the barrels or changing the airflow interfere with the product quality.

MDE Technical Support Document, Control of Volatile Organic Compounds from Distilled Spirits Facilities, COMAR 26.11.19.20, p.1.

Maryland sought to have the EPA approve this RACT rule as part of its State Implementation Plan ("SIP").[14] The regulation imposes good management practice requirements on barrel filling and emptying and on storing empty barrels, but imposes no requirement to capture and control emissions from aging warehouses. In its Federal Register notice accepting this regulation as a SIP amendment the EPA stated:

> Neither the proposed nor adopted version of Maryland's RACT to control VOC emissions from distilled spirits facilities requires that VOCs be controlled from the aging warehouses. The Maryland regulation is not to be construed to mean that the required good operating practices manual extends to the aging process at the affected facility in Maryland.

66 Fed. Reg. 56220 (November 7, 2001). It is quite apparent that the EPA would not have accepted the rule as part of Maryland's SIP if the EPA had concluded that technology to capture and control aging emissions was reasonably available. Quite the opposite is true. Since at least 1978, the EPA has acknowledged that technologies capable of capturing and controlling VOC

[14] The regulation is codified at COMAR 26.11.19.29. The Clean Air Act requires states to develop plans for implementing Clean Air Act requirements within the state, most of which consist of rules and regulations, and to submit those plans to EPA for approval. Those are known as State Implementation Plans ("SIP"). 42 U.S.C. §7410. In November of 2000 Maryland asked the EPA to approve a SIP amendment consisting of adding this and other RACT rules to its SIP. 66 Fed. Reg. 28058 (May 22, 2001).

emissions will not work for whiskey aging emissions because they damage the product.[15]

Plaintiffs allege generally that "regulatory *agencies* in other *states* have determined that many [ethanol-control technologies] were cost effective." Amended Complaint, ¶ 126 (emphasis added). In contrast, they limit their specific allegations to a *single* agency in *California*. Yet, that agency, the San Joaquin Valley Unified Air Pollution Control District ("SJVUAPCD"), has required ethanol emission control technologies solely for brandy aging. Brandy is a much different product than whiskey because it is aged for a much shorter time and its consumer demanded taste (including smoothness and aroma) is not nearly as sensitive to the aging process. The SJVUAPCD expressly recognized this difference, stating in a staff report prepared while developing a rule to impose capture and control obligations on brandy aging facilities that "whiskey aging is not considered or included in this rule development process."[16]

To summarize, Plaintiffs' reliance on allegations concerning the brandy industry in California is contrary to the consistent position of the federal EPA over the past 35 years, contrary to the position of state and local agencies that have reviewed the issue of emission controls in whiskey aging warehouses, and even contrary to the express determination of the California agency on which Plaintiffs base the allegations of their complaint concerning the

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[15] Cost and Engineering Study – Control of Volatile Organic Emissions from Whiskey Warehousing, EPA-450/2-78-013 (April 1978), Emission Factor Documentation for AP-42, Section 9.12.3 (March 1997).

[16] Final Draft Staff Report for New Draft Rule 4695 (Brandy Aging and Wine Aging Operations), September 17, 2009, p.3. The complete staff report statement on this is as follows:

> *The District staff understands that the nature of whiskey aging operations differs from wine and brandy aging. Specifically, the ambient conditions, such as storage temperature and humidity, as well as seasonal variations, are important factors in the whiskey aging process. All aging processes depends upon the interaction of product in oak barrels, whiskey aging operations strive for a particular blend of temperature, humidity, and ventilation, leading to different types of warehouse. (Source: EPA, Final report: Emission Factor Documentation for AP-42, Section 9.12.3, Distilled Spirits, p, 2-7 (March 1997)). Therefore, whiskey aging is not considered or included in this rule development process.*

availability and effect of systems for controlling whiskey aging warehouse emissions.

4. Diageo's operation and permits.

Plaintiffs' allegations concerning emission control technology and their demand for a mandatory permanent injunction requiring Diageo to use this technology in its aging warehouses also ignores – and once again is directly contrary to – the terms of Diageo's air pollution control permits. Diageo has aged whiskey in Shively since before 2000, in a facility it owns at 3860 Fitzgerald Road where whiskey aging operations have continued without interruption from Derby Day 1935 when Stitzel-Weller Distillery Incorporated began making whiskey there. Beginning in 2008, Diageo leased two warehouses a few blocks away from the Fitzgerald Road facility and converted them for whiskey aging. They are located on Miller Lane in Shively.

a. The 2001 FEDOOP.

Diageo's whiskey aging operations at its Fitzgerald Road facility are governed by a Federally Enforceable District Origin Operating Permit (FEDOOP), which was issued by the District. The current FEDOOP was issued in 2001.

The 2001 FEDOOP permits Diageo to maintain "[e]ighteen (18) warehouse storage operations for aging whiskey in 55 gallon barrels." *See* 2001 FEDOOP, Attachment 148-93. The 2001 FEDOOP permits Diageo to utilize the maximum storage capacity of each warehouse, which varies from a low of 12,600 barrels in seven of the warehouses to a high of 24,360 barrels in the three largest warehouses. *Id.*, p. 2. The maximum storage capacity for all eighteen warehouses is 312,200 barrels. *Id.*

The 2001 FEDOOP does not require Diageo to use any sort of control equipment to capture, collect or control ethanol emissions from its whiskey barrels. *See generally* 2001

FEDOOP. In this regard, the 2001 FEDOOP expressly states that "VOC emissions from this facility are fugitive emissions." *Id.*, Attachment 148-93, p. 2.[17]

b. The Fitzgerald Road construction permit.

On March 31, 2006, Diageo received a permit to install a new state-of-the-art barrel emptying and filling operation at the Fitzgerald Road facility and to adapt one building for additional barrel aging of up to 150,000 barrels. *See* Permit No. 32-06-C. This construction permit limits VOC emissions from the barrel emptying and filling operation to 0.83 ton during any calendar month and ten tons during any consecutive 12-month period.[18] *Id.* The permit does not require Diageo to use emission control equipment in its whiskey aging warehouses (where potential emissions were calculated by the District at 664 tons per year), because such emissions are considered fugitive emissions. *Id.*

c. The January 2008 Miller Lane permit.

In January 2008, the District issued a construction permit to Diageo, allowing it to construct or operate an additional whiskey aging warehouse with a 100,000 barrel capacity at its leased Miller Lane location. *See* Permit No. 75-08-C. The District projected potential ethanol emissions from the warehouse at 332 tons per year. *Id.*, p. 4. Again, the "storage of beverage alcohol in barrels" inside the warehouse is not subject to any emission control requirements because "[w]arehouse emissions are fugitive emissions." *Id.*

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[17] The term "VOC emissions" is an abbreviation for "Volatile Organic Compounds." Ethanol is a VOC. As noted in section 3, *supra*, a "fugitive emission" is one that cannot be reasonably collected.

[18] The District further determined that the work practice standards coupled with a 10 ton per year VOC emission limit represents Best Available Control Technology (BACT) for the type of barrel filling and barrel emptying operations at this facility. *Id.*

d. The August 2008 Miller Lane permit.

In August 2008, the District issued a permit to Diageo that authorized the company to construct or operate a second whiskey-aging warehouse with a 130,000-barrel capacity at the leased Miller Lane site. *See* Permit No. 511-08-C. Consistent with Diageo's other permits, this permit does not require Diageo to use any type of control equipment to capture, collect or control ethanol emissions (which the District calculated at 493 tons per year) resulting from the storage and aging of whiskey in barrels stored inside the warehouse. *Id.* The District also confirmed, as it had done in the previous permits, that: "Warehouse emissions are fugitive emissions." *Id.*, p. 4.

So at all times relevant to the allegations of the amended complaint, Diageo has operated in Jefferson County pursuant to permits issued by the District. Consistent with EPA determinations, the permits recognize that Diageo stores large amounts of whiskey in barrels in its whiskey aging warehouses, that the whiskey stored in the aging warehouses will emit ethanol emissions as a natural result of the aging process, and that those emissions are fugitive emissions, *i.e.*, emissions that cannot be controlled. Diageo's permits do not require Diageo to use emission control technology, and, as the EPA and other agencies have found, there is no such technology that could capture ethanol emissions from Diageo's whiskey warehouses without damaging the product. *See* Section 3, *supra*.

5. The notice of violation letter.

In connection with their negligence claim (Count I of the First Amended Complaint), Plaintiffs allege that Diageo "breached [its] duty to the Plaintiffs when [it] violated Section 1.09 of the [District's] regulations." *See* First Amended Complaint, ¶ 79.

Section 1.09 of the District's regulations prohibits, *inter alia* "the emission of air pollutants which . . . cause injury or damage to . . . property." *See* Louisville Metro Air Pollution

Control District Regulation 1.09.

Plaintiffs quote extensively from an Incident/Violation Report prepared by District Investigator Nicholas Hart, who summarizes complaints allegedly received from unidentified residents (including one or more Plaintiffs) residing in the vicinity of Miller Lane. The alleged complaints are similar to those asserted in the First Amended Complaint. *See* Notice of Violation Letter 02425 and Incident/Violation Report. *Id.* The Incident/Violation Report references only Diageo's leased warehouses at Miller Lane. *Id.*

The Incident/Violation Report is not a final determination of the District, which by statute and by its own regulations may take official action only through an order of its Board. *See* KRS 77.310(3); Louisville Metro Air Pollution Control Regulation 1.08. The Board may issue an order finding a violation to have occurred only after holding a full administrative hearing before a qualified hearing officer. KRS 77.310. Plaintiffs do not and cannot allege that the Board has taken official action against Diageo, or issued a final order in this matter.

The Notice of Violation Letter is not a final order. It is merely an allegation of non-compliance, a fact the letter makes perfectly clear in its very first sentence (which Plaintiffs ignore in their Complaint): "The Louisville Metro Air Pollution Control District ("District") *alleges* that your company has violated certain District regulations." Notice of Violation Letter, *supra* (emphasis added). In essence, Plaintiffs are attempting to support the allegations of the First Amended Complaint with unproven and untested allegations asserted in the District's letter to Diageo.

ARGUMENT

1. The legal standard governing motions under rule 12(b)(6).

Diageo moves to dismiss with prejudice all five counts of Plaintiffs' First Amended Complaint for failure to state a claim upon which relief may be granted. Where the material allegations of a complaint are based on speculation and conjecture rather than allegations of fact supporting the elements of the cause or causes of action at issue, the complaint fails as a matter of law. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678-82, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2007); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56, 127 S.Ct. 1956, 167 L.Ed.2d 929 (2007). Moreover, the factual allegations of the complaint "must be enough to raise a right to relief above the speculative level." 550 U.S. at 555. A complaint that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Id.* Nor does a complaint state a cause of action if it bases its material allegations on "naked assertions" devoid of "further factual enhancement." *Id.* at 557; *Iqbal, supra*, 556 U.S. at 678.

Similarly, a complaint fails to state a claim if its material allegations are based on legal conclusions rather than allegations of fact. *Iqbal, supra*, 556 U.S. at 678. When considering a motion to dismiss for failure to state a claim, courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly, supra*, 475 U.S. at 555, *quoting Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal, supra*, 556 U.S. at 678. Rule 8 of the Federal Rules of Civil Procedure "marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more

than conclusions." *Id.* at 678-79. "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.* at 679.

This gate-keeping requirement is of particular importance in cases involving complex claims and multiple parties, where discovery related to even a meritless claim would expose the defendant to "potentially enormous expense" in the discovery phase of the action. *Twombly, supra*, 550 U.S. at 558-60, *quoting Associated General Contractors of California, Inc. v. Carpenters*, 459 U.S. 519, 528 n. 17, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983) ("[A] district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.").

In short, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Iqbal, supra*, 556 U.S. at 679; *Twombly, supra*, 550 U.S. at 556. "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal, supra*, 556 U.S. at 679. Where the "well-pleaded facts" – i.e., factual allegations that are neither speculative nor conclusory – "do not permit the court to infer more than the mere possibility of misconduct," the complaint fails to state a claim upon which relief can be granted. *Id.*

Following the dictates of *Iqbal* and *Twombly*, a court considering a motion to dismiss can "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Iqbal, supra*, 556 U.S. at 679. For example, in an antitrust case, the plaintiff's allegation that the defendants engaged in an unlawful agreement is a "legal conclusion" and thus, is not entitled to an assumption of truth. *Id.* at 680.

The court may use the same approach to disregard allegations that are speculative rather than factual, or that require the court to make "unwarranted" factual inferences. *Directv, Inc. v.*

Treesh, 487 F.3d 471 (6th Cir. 2007) (when ruling on a motion to dismiss for failure to state a claim, courts "need not accept as true *legal conclusions* or *unwarranted factual inferences*"), quoting *Gregory v. Shelby County, Tenn.*, 220 F.3d 433, 446 (6th Cir. 2000) (emphasis added); *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987) (same); *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir. 1976) (same).

2. Plaintiffs' claims fail as a matter of law.

Plaintiffs' factually unsupportable emission control and RTO allegations are material to the essential elements of all five causes of action in their First Amended Complaint. Plaintiffs allege that Diageo "has not adopted emission control technology to reduce the ethanol emitted during its alcoholic beverage production operation," that it "has a duty to minimize and prevent ethanol emissions from entering on Plaintiffs' property" that its "ethanol emissions can be corrected or abated at reasonable expense," that "[a] number of different ethanol-capture technologies have been developed since 2005 that are 99% efficient in eliminating ethanol releases from aging warehouses and regulatory agencies in other states have determined that many ... were cost effective," and "[t]he experience of the brandy makers in California demonstrates that [RTO] technology is available, affordable, and effective." Amended Complaint, ¶¶ 23, 71, 87, 126 and 134.

a. The negligence claim.

It is through these emission control and RTO allegations that Plaintiffs attempt to plead the elements of duty and breach of duty to support the negligence claim asserted in Count I of the First Amended Complaint. *See* First Amended Complaint, ¶¶ 70-71. *See generally Rockwell Int'l Corp. v. Wilhite*, 143 S.W.3d 604, 620 (Ky. App. 2003) (negligent trespass claim requires proof that defendant breached duty of care owed to plaintiff); *Mullins v. Commonwealth Life Ins. Co.*,

839 S.W.2d 245, 248 (Ky. 1992) (negligence claim requires proof that defendant breached duty owed to plaintiff).

Here, Plaintiffs assert that Diageo "has not adopted emission control technology to reduce the ethanol emitted during its alcoholic beverage production operations" (First Amended Complaint, ¶ 23), despite having an alleged "duty to minimize and prevent the ethanol emissions from entering on to Plaintiffs' property and the property of others similarly situated" (*id.*, ¶ 71)." But as demonstrated above, neither the EPA nor the District require Diageo to use emission control technology, and no federal, state or local laws mandate its use in whiskey aging warehouses. Moreover, since the RTO technology that Plaintiffs demand Diageo be ordered to adopt has been attempted in brandy manufacturing in California, and not in whiskey aging warehouses in Kentucky, it is pure speculation to allege that RTO technology would reduce emissions from Diageo's whiskey aging warehouses without adversely affecting Diageo's entire whiskey aging process and its entire whiskey inventory warehoused in Jefferson County, Kentucky. Such allegations fail to state a claim under *Iqbal* and *Twombley*.[19]

Plaintiffs further allege that the District "cited" Diageo for a violation of District Regulation 1.09, inferring that the "citation" establishes a breach of a duty by Diageo. *See* First Amended Complaint, ¶ 79; Background, Section 5, *supra*. However, this alleged citation is nothing more than a letter expressing a view of District staff and does not represent any government agency determination. The District's Notice of Violation Letter expressly provides that the District "alleges" that a violation has occurred, not that it has made a final determination

[19]To the extent it is based on alleged damage to real property, the negligence claim also fails as a matter of law because claims for negligent damage to real property sound in trespass. *See Mercer v. Rockwell Int'l Corp.*, 24 F.Supp 2d 735, 743 (W.D. Ky. 1998) ("[E]very negligent injury to real property sounds in trespass."). *See also Dickens v. Oxy Vinyls, LP*, 631 F. Supp. 2d 859, 864 (W.D. Ky. 2009) (dismissing negligence and gross negligence claims for alleged damage to real property).

or issued a final order to that effect. *See* Notice of Violation Letter. Indeed, as the United States Supreme Court has noted, a notice of violation or even an administrative complaint issued by an agency without any further proceedings has no legal force or effect. *See FTC v. Standard Oil Co.*, 449 U.S. 232, 242, 101 S.Ct. 488, 66 L.Ed.2d 416 (1980) (administrative complaint was not final agency decision and had no legal force.)

It is clear on the face of the letter from the District and attached Report that it is based on unsubstantiated claims by neighbors and conclusions drawn using unscientific methods and untrained observers. *Id.* This alleged citation provides no greater evidence of a duty and a breach of a duty than would be provided by a complaint filed in a second lawsuit containing allegations similar to Plaintiffs' claims.

b. The nuisance claims.

In like manner, it is through these same emission control and RTO allegations that Plaintiffs seek to plead the necessary element of "unreasonable" conduct by Diageo to support the temporary (Count II) and permanent (Count III) nuisance claims in the First Amended Complaint. *See* First Amended Complaint, ¶¶ 86-87, 90-91. *See generally Smith v. Carbide & Chems.Corp.*, 507 F.3d 372, 379 (6th Cir. 2007) (under Kentucky law, a nuisance "arises from the unreasonable, unwarranted or unlawful use by a person of his own property"); *Louisville Ref. Co. v. Mudd*, 339 S.W.2d 181, 186 (Ky. 1960) (same).

It is through the allegation that "[r]easonable and cost effective emissions control technology exists" (First Amended Complaint, ¶ 24), and the allegation that "Defendant's ethanol emissions can be corrected or abated at reasonable expense to the Defendant" (*id.*, ¶ 87), that Plaintiffs attempt to plead unreasonable conduct by Diageo. Yet when these allegations are disregarded as speculative and conclusory, as they must under *Iqbal* and *Twombly*, there is no

factual basis alleged in the First Amended Complaint to support an inference of unreasonable conduct by Diageo. Therefore, the nuisance claims in Counts I and II of the First Amended Complaint fail as a matter of law.

c. The trespass claim.

Turning to Count IV of the First Amended Complaint, it is through these same allegations that Plaintiffs attempt to plead either a negligent trespass (based on Diageo's alleged breach of a claimed duty to use emission control technology in its aging warehouses) or an intentional trespass (based on operating a whiskey aging warehouse without using RTO or other "reasonable and cost effective" emission control technology). *See* First Amended Complaint, ¶¶ 24, 106. *See generally Rockwell Int'l Corp., supra*, 143 S.W.3d at 620 (negligent trespass claim requires proof that defendant breached duty of care owed to plaintiff); *Rudy v. Ellis*, 236 S.W.2d 466, 468 (Ky. 1951) (intentional trespass claim requires actual knowledge of wrongdoing by defendant); *Lebow v. Cameron*, 394 S.W.2d 773, 776 (Ky. 1965) ("A willful trespasser knows he is wrong.").

Again, however, the EPA and the District do not require Diageo to use emission control technology, and the use of such technology (including the RTO technology touted by Plaintiffs) is untested and unproven in whiskey-aging warehouses. Thus, Plaintiffs' allegations must be disregarded as conclusory and speculative, and when they are disregarded, there is no basis to allege either a negligent or intentional trespass by Diageo.

d. The claim for injunctive relief.

Finally, the allegations concerning "available, affordable and effective" emission control technology used by certain brandy manufacturers in California are pivotal to Plaintiffs' demand for a mandatory permanent injunction, asserted in Count V of the First Amended Complaint. *See*

First Amended Complaint, ¶¶ 118-136, 140. Indeed, Paragraph 140 of the First Amended Complaint expressly states: "The Defendant's conduct creating the nuisance alleged herein can be corrected or abated at reasonable expense to the Defendant [by installing and using RTO technology], and since it can be abated or corrected, public policy requires the Court enter an order of permanent injunction to avoid a permanent nuisance." *Id.*, ¶ 140. *See generally eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391, 126 S.Ct. 1837, 164 L.Ed. 2d 641 (2006) (plaintiff seeking permanent injunction must prove (1) that he or she has suffered irreparable injury, (2) that remedies available at law, such as monetary damages, are inadequate to compensate for the injury, (3) that the balance of hardships between the parties favors issuance of an injunction, and (4) that the public interest would not be disserved by a permanent injunction).

But, as with Plaintiffs' other causes of action, Count V of the First Amended Complaint lacks an adequate factual basis for the proposed injunction when the RTO allegations are disregarded as conclusory and speculative – as they must, given that whiskey is not brandy, whiskey warehouses are not brandy warehouses, Kentucky is not California, and (most importantly) RTO technology has never been used in whiskey aging warehouses. It is inherently and grossly speculative to allege that a technology which disrupts the aging process and which has never been used in a whiskey-aging warehouse is "available, affordable and effective." It is continuing speculation for Plaintiffs to allege that such a technology is "reasonable" or that "public policy requires" that it be imposed on Diageo through a mandatory permanent injunction. Plaintiffs' claim for injunctive relief must be dismissed as a matter of law.

CONCLUSION

The First Amended Complaint seeks to impose liability – and a potentially draconian, product-harming injunction – on Diageo based on allegations concerning emission control technology and its applicability to whiskey-aging warehouses that are conclusory and speculative, that ignore 35 years of EPA review, that ignore the requirements of the EPA-approved permits issued to Diageo by the District, and that are contrary to the conclusion of the California agency on which Plaintiffs rely to support their RTO claims. For these reasons, and for all of the reasons stated above, the Court should enter an order granting Diageo's motion to dismiss the First Amended Complaint with prejudice.

Dated: November 8, 2012 Respectfully submitted,

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By Electronic and U.S. Mail

May 26, 2017

Susan M. Tennenbaum
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Re: MGPI of Indiana, LLC Notice and Finding of Violation

Dear Susan:

As you know, I was recently brought on board by MGP Ingredients (MGP) to explore the possibility of finding a mutually acceptable settlement to your December 21, 2016 Notice and Finding of Violation issued to MGPI of Indiana, LLC (MGPI). My co-counsel Tony Sullivan and I were surprised and very disappointed with your May 12 email, which we interpreted as meaning that EPA Region V did not want to meet with us unless we agreed in advance to propose a program of controls on whiskey aging warehouses.

In what follows, we explain why Region V cannot via notice of violation unilaterally change EPA's long-stated policy that the so-called "angels' share" that leaks out of the barrels during whiskey aging are fugitive emissions that are not subject to control.

The Fair Notice Doctrine Precludes Enforcement Prior to an Announcement by EPA Headquarters of a Change in Position. Under the fair notice doctrine, which is described in more detail below, any federal agency, including EPA, has an obligation to tell the regulated community the "rules of the game" in advance of bringing an enforcement proceeding for allegedly violating them. As outlined below, as of the date of the purported "violation," *all* of EPA's notices and statements of position to the regulated community, including the RACT/BACT/LAER clearinghouse, continued the Agency's long-standing policy as stated in the 2000 Letter from the Deputy Assistant Administrator for Air and Radiation (copy attached) that the "angels' share" that leaks out of wooden barrels naturally during whiskey aging are fugitive emissions that are not subject to control without unacceptable effects on product quality.

There has been no announcement to the regulated community of any change in this long-standing position by EPA Headquarters, nor has there been an opportunity for notice and comment on the recent efforts by Gallo to control emissions from a brandy aging warehouse in California. In fact, even the San Joaquin Valley Air Pollution Control District, which promulgated the rule governing the Gallo facility, expressly acknowledged that it "understands that the nature of whiskey aging operations differs from wine and brandy aging. Specifically, the ambient conditions, such as storage temperature and humidity, as well as seasonal variations, are important factors in the whiskey aging process. All aging processes[] depend[] upon the interaction of product in oak barrels, whiskey aging operations strive for a particular blend of temperature, humidity, and ventilation, leading to different types of warehouse. Therefore,

whiskey aging is not considered or included in this rule development process." Final Draft Staff Report at 3 (Sept. 17, 2009) (citing EPA's AP-42 factors).[1]

At a minimum, before changing its position, EPA would have an obligation to determine, and to make available for public comment and criticism, whether there has been an adverse effect on product quality in the Gallo experiment or whether the results, even if successful, can be projected to the quite different process of traditional natural aging of Bourbon whiskey, which we are advised is very different than brandy. Indeed, EPA recognizes the difference between brandy and whiskey warehouses, as it has an AP-42 emission factor for brandy and wine aging separate from the factor used for whiskey aging. *Compare* EPA Office of Air Quality Planning & Standards, Emission Factor Documentation for AP-42, Section 9.12.2 Standards of Performance for New Stationary Sources (Oct. 1995) (standards for wine and brandy) *with*, Section 9.12.3 Standards of Performance for New Stationary Sources (Mar. 1997) (standards for other distilled spirits). We do understand that certain Region V staff apparently disagree with all the Agency's prior conclusions, and also with those of their colleagues in other regions, but bringing an enforcement case based on isolated opinions alone, rather than what the Agency has officially told the regulated community consistently in the past is simply impermissible. As the late Justice Scalia put it for an unanimous Supreme Court,

> "It is hard to imagine a more violent breach of [the requirement of reasoned decision-making] than applying a rule of primary conduct ... which is in fact different than the rule or standard formally announced."[2]

We are bringing this to your attention first in the hopes that you will be persuaded to drop the Notice and Finding of Violation (NFV) and advise your colleagues to work through normal channels of consultation—including with the regulated community—to try to change the agency's position if you believe a policy change is appropriate. It is also noteworthy that at the time of the alleged violations, the area was actually in compliance with the NAAQS for ozone, as EPA later acknowledged by re-designating it as attainment. 82 Fed. Reg. 16,940 (Apr. 7, 2017). That fact alone would justify an exercise of prosecutorial discretion not to bring a case seeking to impose LAER. However, if you are determined to proceed with the NFV even though EPA Headquarters has not notified the regulated community that it is reconsidering or changing its long-standing position, we will of course be forced to elevate the issue with the political leadership of the agency, including OAR, OAQPS, OECA, OGC, the Department of Justice, and if necessary, in court.

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[1] *Available at* https://www.valleyair.org/Board_meetings/gb/agenda_minutes/Agenda/2009/September/Agenda_Item_9_Sep_17_2009.pdf

[2] *Allentown Mack Sales and Service Inc. v. NLRB*, 522 U.S. 359, 374 (1998).

I. The Fair Notice Doctrine

"It is a cardinal rule of administrative law" that a regulated entity must be given fair notice of "what conduct is prohibited or required of it." *Wisconsin Res. Prot. Council v. Flambeau Min. Co.*, 727 F.3d 700, 707 (7th Cir. 2013) (quotation marks omitted). "In the absence of notice . . . an agency may not deprive a party of property by imposing civil or criminal liability." *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995).

An agency has "has fairly notified a petitioner" if "by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, *with ascertainable certainty*, the standards with which the agency expects parties to conform." *Flambeau*, 727 F.3d at 708 (quotation marks omitted) (emphasis added). Importantly, an agency's position can be entirely permissible, but nevertheless fall afoul of the fair notice requirement if the agency has not provided adequate notice. *Gen. Elec.*, 53 F.3d at 1325 ("We conclude that EPA's interpretation of those regulations is permissible, but because the regulations did not provide GE with fair warning of the agency's interpretation, we vacate the finding of liability and set aside the fine."). The consistency of an agency's public proclamations on an issue is crucial to providing notice of what is required. *See United States v. Lachman*, 387 F.3d 42, 57 (1st Cir. 2004) ("When the agency itself issues contradictory or misleading public interpretations of a regulation, there may be sufficient confusion for a regulated party to justifiably claim a deprivation of fair notice."); *United States v. S. Ind. Gas & Elec. Co. (SIGECO)*, 245 F. Supp. 2d 994, 1021 (S.D. Ind. 2003) ("Confusion within the enforcing agency as to the proper interpretation of a regulation is relevant evidence that suggests lack of fair notice.").

MGPI lacked fair notice that its construction of new whiskey aging warehouses was a "major modification" requiring a permit for at least two reasons. First, even though EPA Region V alleges in its Notice and Finding of Violation that emissions from whiskey aging operations are not fugitive, EPA headquarters and other regional offices have consistently taken the exact opposite view for decades, making the instant enforcement action an abrupt shift in policy. Second, MGPI lacked notice that fugitive emissions would be considered in the major modification determination because of the uncertainty surrounding the legal status of EPA's fugitive emissions rules and the Indiana SIP.

II. Even If Whiskey Aging Emissions Are Properly Considered Not Fugitive, EPA Failed to Provide Requisite Notice of That Regulatory Status.

Fugitive emissions are those which "could not *reasonably* pass through a stack, chimney, vent, or other functionally equivalent opening." *See* 40 C.F.R. §§ 51.301, 52.21(b)(20) (emphasis added); *see also* 45 Fed. Reg. 52,676, 52,692-93 (Aug. 7, 1980) (fugitive emissions are those which would not "ordinarily be collected and discharged through stacks or other functionally equivalent openings").

EPA headquarters, other EPA regions, and state permitting officials exercising their authority under the Clean Air Act have long concluded, and repeatedly informed the regulated community, that emissions from whiskey aging operations cannot be reasonably collected

because the collection process would ruin the whiskey being aged. MGPI maintains that this conclusion is correct, and such emissions are indeed fugitive.

Perhaps most significantly, a search of EPA's RACT/BACT/LAER Clearinghouse shows that there are no control methods listed for alcohol aging operations. EPA has described the clearinghouse as being able to "help permit applicants and reviewers make pollution prevention and control technology decisions for stationary air pollution sources." EPA, Permit Data Base.[3] EPA is required by statute to maintain the Clearinghouse to "make information regarding emission control technology available to the States and to the general public." 42 U.S.C. § 7408(h). Permitting authorities are required to provide LAER information to EPA for inclusion in the Clearinghouse. 42 U.S.C. § 7503(d). Given that LAER information must be on the Clearinghouse, and EPA is statutorily required to maintain it as a repository of data relating to permitting , it is quite significant that no such controls are listed in the Clearinghouse.

The absence of any RACT/BACT/LEAR Clearinghouse controls for alcohol aging operations is also consistent with permitting decisions relating to whiskey aging facilities. For example, in 2012 Kentucky permitted a Louisville whiskey warehouse, characterizing the emissions as fugitive in nature. Louisville Metro Air Pollution Control Dist., Title V Statement of Basis, at 11 (2012).[4] *See also* San Joaquin Valley Unified Air Pollution Control Dist., Appendix K: Reasonable Available Control Technology Analysis (RACT) for Wine Fermentation, Wine Storage Tanks, and Brandy Aging at 12-13 (Apr. 30, 2007) (District could not "find *any facility in the nation* that are (sic) mandated to control" emissions from whiskey aging (emphasis added)).[5] Likewise, the Indiana Office of Environmental Adjudication has concluded that whiskey aging emissions are fugitive in nature. *See In Re: Objection to the Issuance of Part 70 General Operating Permit No. T-137-6928-000111 for Joseph E. Seagram & Sons, Inc.*, 2004 OEA 58 (03-A-J-3003), at 64 (Ind. Office of Envtl. Adjud., Aug. 4, 2004).[6]

EPA has long agreed with this view in various sources beyond the Clearinghouse. In an October 23, 2000 letter to the Chair of the Senate Committee on Environment & Public Works, the Deputy Assistant Administrator for Air and Radiation said plainly that EPA has not identified "*any* . . . technology which it considers to be [reasonably available control technology] for alcohol beverage aging warehouses" in part because of concerns that such technology would "adversely affect the product quality." Letter from John C. Beale, Deputy Assistant

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[3] https://www.epa.gov/catc/ractbactlaer-clearinghouse-rblc-basic-information.

[4] *Available at* https://louisvilleky.gov/sites/default/files/air_pollution_control_district/documents/permits/titlev/20120601basis136_97_tv_r1_plant244.pdf

[5] *Available at* https://www.valleyair.org/Air_Quality_Plans/docs/AQ_Ozone_2007_Adopted/28%20Appendix%20K%20April%202007.pdf.

[6] *Available at*: http://www.in.gov/oea/decisions/2004oea58.pdf

Administrator for Air and Radiation, U.S. EPA, to the Hon. Robert C. Smith, Chairman, Senate Comm. on Env't & Pub. Works (Oct. 23, 2000) (the "2000 Letter") (emphasis added) (attached).

This letter reflects EPA's longstanding position, and the position it states has been repeatedly reiterated, and never retracted, by the Agency.

As long ago as 1978, EPA concluded that "control of emissions from whiskey warehousing has not been demonstrated at this time." EPA, Emission Standards and Engr'g Div., Chemical and Petroleum Branch, Office of Air Quality Planning and Standards, Cost and Engineering Study - Control of Volatile Organic Emissions From Whiskey Warehousing at 1-4 (Apr. 1978).

In 1987, EPA rejected "proposed control technologies" for storing nonindustrial distilled beverage alcohol because they "could contaminate beverage alcohol, resulting in a product with little or no market value." Standards of Performance for New Stationary Sources: Volatile Organic Liquids Storage Vessels, Final Rule, 52 Fed. Reg. 11,420, 11,434 (Apr. 8, 1987).

In 1994, Region 4 explained that "EPA does not consider windows and screen panels [in whiskey aging warehouses] to fall within" the definition of "functionally equivalent opening" for purposes of fugitive emissions analysis. Letter From Jewell A. Harper, Chief Air Enforcement Branch, Region IV, to John W. Walton, Director of the Div. of Air Pollution Control, Tenn. Dep't of the Envmt. (August 19, 1994).

In 1997, EPA's AP-42 emission factors remarked that "Add-on air pollution control devices for whisky aging warehouses are not used because of the anticipated adverse impact that such systems would have on product quality". EPA Office of Air Quality Planning & Standards, Emission Factor Documentation for AP-42, Section 9.12.3 at 2-12 Standards of Performance for New Stationary Sources (Mar. 1997).[7] EPA is required by statute to update these emission factors once every three years, 42 U.S.C. § 7430, but EPA has not since 1997 updated these factors, demonstrating that this remains the Agency's view.

We also note that a 2015 decision from the 6th Circuit described a permit for a whiskey warehouse in Louisville, Kentucky, noting that "[t]he permit does not cap fugitive ethanol emissions, i.e., those from Diageo's storage warehouses." *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 688 (6th Cir. 2015).

MGPI was entitled to, and did, rely in good faith on this consistently articulated policy, as did its sophisticated environmental consultants. *See, e.g., Beaver Plant Operations, Inc. v. Herman*, 223 F.3d 25, 31 (1st Cir. 2000) (considering testimony of "experts regarding industry practice"); *Martin v. Am. Cyanamid Co.*, 5 F.3d 140, 146 (6th Cir. 1993) (fair notice determination "is made with reference to what an employer familiar with the industry could reasonably be expected to know"); *SEC v. Kovzan*, No. 11-2017, 2012 WL 4819011, at *5 (D. Kan.

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[7] *Available at* https://www3.epa.gov/ttnchie1/ap42/ch09/bgdocs/b9s12-3.pdf

Oct. 10, 2012) ("industry practice may be considered in ruling on fair notice defense"). Region V cannot, consistent with due process, hold MGPI liable for failing to anticipate that Region V would take a position contrary to the rest of the agency.[8]

As the D.C. Circuit has held, "it is unlikely" that an agency has provided "adequate notice when different divisions of the enforcing agency disagree." *GE*, 53 F.3d at 1332 (holding that EPA failed to give fair notice in part because at least one, and possibly two, regional offices had guidance agreeing with the regulated entity's position); *Rollins Envtl. Servs. Inc. v. EPA*, 937 F.2d 649, 653 (D.C. Cir. 1991) (concluding that a penalty could not be imposed in light of the fact that EPA had written a report acknowledging "significant disagreement among various headquarters and regional offices" as to whether conduct that served as predicate to violation was actually illegal).

Region V's NFV is especially impermissible given EPA's regional consistency guidelines that are designed to "[a]ssure fair and uniform application" of the Clean Air Act, 40 C.F.R. § 56.3, evidencing "EPA's firm commitment to national uniformity in the application of its permitting rules," *Nat'l Envtl. Dev. Assoc.'s Clean Air Project v. EPA*, 752 F.3d 999, 1010 (D.C. Cir. 2014). This inconsistent position is particularly problematic under EPA's regional consistency guidelines *See* 40 C.F.R. § 56.5(a) (regional officials must assure that "actions taken under the [Clean Air Act]" are "as consistent as reasonably possible with the activities of other Regional Offices").

III. EPA Has Not Provided Fair Notice That Fugitive Emissions Are Counted in Major Modification Determinations

EPA has also failed to provide fair notice that MGPI's fugitive emissions—VOC emissions from its new aging warehouses—would be considered in the major modification determination. The stay purporting to allow EPA to consider these emissions was invalidly promulgated, and also inconsistent with Indiana's State Implementation Plan (SIP).

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[8] The existence of a 1996 letter in which Region V concluded that VOC emissions from whiskey aging operations were not fugitive does not somehow cure the fair notice problem. *See* Letter from Cheryl Newton, Chief, Permits and Grants Section, Region V, to Paul Dubenetzsky, Permit Branch, Office of Air Mgmt., Indiana Dep't of Envtl. Mgmt. (Apr. 16, 1996). Region V's letter was issued four years *before* the 2000 Letter's authoritative statement that no workable control technology exists, *before* the 1997 AP-42 factors, and *before* the statements by state regulators cited above.

Notably, this letter has been criticized as lacking any supporting analysis. *See In Re: Objection to the Issuance of Part 70 General Operating Permit No. T-137-6928-000111 for Joseph E. Seagram & Sons, Inc.*, 2004 OEA 58 (03-A-J-3003), at 64 (Ind. Office of Envtl. Adjud., Aug. 4, 2004) (specifically criticizing the letter as being devoid of "supporting evidence" and reaching the opposite conclusion). Moreover, Region V's letter itself acknowledged recognizing "a letter from another USEPA region that appears to be inconsistent with [its] position." *See* Letter from Cheryl Newton, *supra*

On December 19, 2008, EPA promulgated the "Fugitive Emissions Rule." 73 Fed. Reg. 77,882 (Dec. 19, 2008). The Rule clarified that fugitive emissions should generally not be considered when determining whether a physical or operational change at an existing source results in a "major modification" under the CAA's New Source Review provisions. *See id.* Under the Rule, fugitive emissions from whiskey aging operations would not be taken into consideration when determining whether a major modification of a source has occurred.[9]

On April 24, 2009, EPA granted a petition to "reconsider" the Fugitive Emissions Rule, and administratively stayed that rule pursuant to the CAA, which authorizes EPA to stay rules pending reconsideration "for a period not to exceed three months." 42 U.S.C. § 7607(d)(7)(B).[10] EPA later extended the stay three times, long beyond three months:

- In December 2009, EPA extended the stay for an additional 3 months. EPA did not take public comment on the extension. 74 Fed. Reg. 65,692 (Dec. 11, 2009).

- In March 2010, EPA extended the stay for another 18 months. EPA provided notice and took comment on whether to extend the stay before issuing the extension. 75 Fed. Reg. 16,012 (Mar. 31, 2010).

- In March 2011, EPA extended the stay indefinitely "until EPA completes its reconsideration of the Fugitive Emissions Rule." 76 Fed. Reg. 17,548, 17,548 (Mar. 30, 2011). EPA did not take public comment, but instead issued the extension pursuant to the "good cause" exemption. *See* 5 U.S.C. § 553(b). Though EPA did take comment after the rule was promulgated, it did not respond to them.

Though EPA stated that it anticipated it would propose and finalize a replacement rule by October 4, 2012, *see* 76 Fed. Reg. at 17,551, it never even proposed a new rule.

EPA's decision to indefinitely stay the Fugitive Emissions Rule is void *ab initio* for two separate reasons.

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[9] The Rule did not apply to–and therefore, fugitive emissions are still counted in major modification determinations for–sources in industries that have been designated through rulemaking under § 302(j) of the CAA. *See* 73 Fed. Reg. at 77,882; *see also* 42 U.S.C. § 7602(j). Whiskey aging operations are not among these industries. *See* 40 C.F.R. §§ 70.2, 71.2 (listing 26 industries as well as "[a]ny other stationary source category which . . . is being regulated under section 111 or 112 of the Act"); *id.* Parts 60, 63 (source categories regulated under sections 111 (new source performance standards) and 112 (air toxics) of the Clean Air Act).

[10] EPA initially announced the stay on April 24, 2009. Letter from Lisa Jackson (Apr. 24, 2009), *available at* https://www.regulations.gov/document?D=EPA-HQ-OAR-2004-0014-0062. EPA subsequently realized that it could not institute a stay without publishing notice in the Federal Register, which occurred on September 30, 2009. 74 Fed. Reg. 50,115, 50,115 (Sept. 30, 2009).

First, EPA lacks authority to stay Clean Air Act rules pending reconsideration for longer than 90 days. 42 U.S.C. § 7607(d)(7)(B) grants EPA authority to issue a three-month stay pending administrative reconsideration, expressly provides that other than that three-month stay period, "[s]uch reconsideration shall not postpone the effectiveness of the rule." The D.C. Circuit has interpreted this language to mean that "the EPA had no authority to stay the effectiveness of a promulgated standard except for the single, three-month period authorized by section 307(d)(7)(B) of the CAA." *NRDC v. Reilly*, 976 F.2d 36, 41 (D.C. Cir. 1992). Accordingly, EPA could not and did not validly stay the 2008 rule for more than three months.

Second, EPA violated the Administrative Procedure Act (APA), 5 U.S.C., § 551 *et seq.*, because it failed to take notice and comment on the indefinite stay. Courts have consistently held that suspensions—particularly indefinite suspensions—of validly-promulgated rules are themselves rulemakings that must go through the APA notice and comment process. *See, e.g.*, *NRDC v. Abraham*, 355 F.3d 179, 204-06 (2d Cir. 2004) (60-day delay of an effective date imposed by an incoming administration was a substantive rule that must comply with the APA); *accord Envtl. Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802 (D.C. Cir. 1983) (indefinite suspension of a rule must go through APA notice and comment procedures); *Ranchers Cattlemen Action Legal Fund v. Dep't of Agriculture*, 566 F. Supp. 2d 995, 1004-05 (D.S.D. 2008) (rejecting the argument "that a temporary postponement of an effective date is not a rulemaking").[11]

Because it did not go through the proper procedures, the indefinite stay of the Rule is void and the parties should be "place[d] . . . in the positions they would have been if the APA had not been violated"—i.e., "EPA's postponement" of the 2008 rule is invalid and should not be given effect. *NRDC v. EPA*, 683 F.2d 752, 768 (3d Cir. 1982).

Even if EPA could prevail on the argument that the indefinite stay is valid, the uncertainty surrounding the legal status of the Fugitive Emissions Rule means that MGPI lacked notice that emissions from the whiskey warehouses would be counted towards a major modification determination. EPA stayed the Rule by invoking § 307(d)(7)(B) of the CAA, which permits only a 90-day stay, a deadline which has long since passed. It then "indefinitely" stayed the Rule pending reconsideration, but never took any action towards actually revising it. At best for EPA, the status of fugitive emissions was in limbo. At worst, the stay plainly expired by operation of law.

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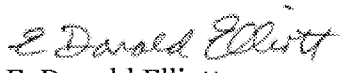
[11] "[T]he provision of post-promulgation notice and comment procedures cannot cure the failure" to promulgate the stay validly in the first place. *NRDC v. EPA*, 683 F.2d 752, 768 (3d Cir. 1982). *See also Abraham*, 355 F.3d at 206 n.14 (agreeing with *NRDC*); *N.J. Dep't of Envtl. Protection v. EPA*, 626 F.2d 1038, 1049 (D.C. Cir. 1980) ("The Administrator now argues that his provision for post hoc comment 'cures' his failure to follow section 553's procedures. We cannot agree."). Nor can EPA rely on the good cause exemption, as it took notice and comment on the second of the three stays of the Fugitive Emissions Rule, and did not point to any new circumstances to justify disregarding the requirement to take public comment for the third stay extension.

Further adding to the uncertainty, Indiana's SIP, which EPA must approve, is inconsistent with the notion that the stay of the Fugitive Emissions Rule is in effect. Subject to exceptions not relevant here, fugitive emissions are not counted for major modification determinations under the SIP. *See* 326 Ind. Admin. Code § 2-3-2(g). EPA never issued a SIP call to revise the SIP to conform to its indefinite stay. MGPI cannot be faulted for complying with the plain terms of the Indiana SIP.

* * *

I hope this letter helps you understand the merits of our legal position. Tony and I look forward to discussing it with you and moving forward to resolve this case.

Sincerely,



E. Donald Elliott
Senior of Counsel

Of Counsel

Tony Sullivan
Barnes & Thornburg LLP
11 S. Meridian St.
Indianapolis, IN 46204
317 231-7472
Tony.Sullivan@btlaw.com

Attachment

Message

From: Whitfield, Peter C. [peter.whitfield@hoganlovells.com]
Sent: 6/22/2017 9:25:52 PM
To: Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]
Subject: Helium

Figured you would enjoy this news piece given our relation to securing America's helium supply

Fix to secure steady helium supply gets broad backing

Dylan Brown, E&E News reporter

Published: Thursday, June 22, 2017

With a one-sentence fix, Congress hopes to preserve a steady supply of American helium and eliminate uncertainty shrouding the global market for an element key to medical and military science.

Helium companies and federal regulators backed the "Helium Extraction Act" discussion draft yesterday at a House Natural Resources Subcommittee on Energy and Mineral Resources hearing.

The bill would add a provision to the Mineral Leasing Act that allows helium production on federal land "as if the extracted helium were oil and gas."

Helium is currently produced as a byproduct of natural gas drilling. Its unique properties as a nonreactive gas and super-cooling liquid make it invaluable to MRI machines and rocket fuel.

"Helium as a rare element is much more than balloons," said Walter Nelson, vice president and general manager of Pennsylvania-based Air Products and Chemicals Inc.

Of roughly 1.7 billion cubic feet of helium consumed in the U.S. last year, 17 percent was used as lifting gas, but 30 percent was used for MRIs and the rest went toward various engineering and scientific applications.

The U.S. is already the world's top helium producer, but the sudden political crisis in Qatar, the next largest helium producer, has imperiled roughly 30 percent of global supply. The embargo, led by Saudi Arabia, triggered the shutdown of Qatar's two major helium plants. Algeria and Russia are the next largest sources of helium, raising national security concerns.

"If this disruption continues for any substantial period of time, there will be shortages," Nelson said.

The Bureau of Land Management responded by increasing allocations from the Federal Helium Reserve, the source of 40 percent of all U.S. helium.

Since 1925, the federal government has stored helium in a natural geologic formation called the Bush Dome at the Cliffside Storage Facility northwest of Amarillo, Texas. Five private plants were later built to recover helium from natural gas, filling the reservoir via a 450-mile pipeline.

But buying helium left the federal government more than $1 billion in debt by 1996 when Congress passed the Helium Privatization Act.

BLM has since been selling off the reserve to refiners connected to the pipeline, with Air Products being the largest.

In 2013, concerns about a long-term supply and price spikes caused Congress to delay closure of the Cliffside facility until 2021 (*E&E Daily*, July 9, 2015).

"We're reading that as come 2021, the government will be out of the helium storage business," said Tim Spisak, BLM's senior adviser for minerals and realty management.

That has jump-started the push for extraction beyond the existing pipeline.

Jason Demers, president of Canadian energy firm Tacitus Ventures Corp., said yesterday the company has already identified 3 billion to 7 billion cubic feet of helium.

Spisak said six federal contracts for helium production at natural gas sites already yield more than 1 billion cubic feet, with roughly 8 percent royalty on liquid helium.

Another option is recycling helium. University of California, Los Angeles, physics professor Stuart Brown said an investment can pay for itself over the years but is too substantial upfront for many academics and smaller companies.

In his testimony, Brown said: "This subcommittee should consider legislation that provides support to federal agencies to sponsor programs aimed at reducing researchers' helium consumption and expenditures without compromising the vitality of their research programs."

Peter Whitfield
Senior Associate

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Washington, DC 20004

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Fax: +1 202 637 5910
Email: peter.whitfield@hoganlovells.com
www.hoganlovells.com

Message

From: Burke, Marcella [mburke@akingump.com]
Sent: 6/16/2017 9:39:18 PM
To: Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]
Subject: Introduction to Marcella Burke
Attachments: Marcella Burke Cover Letter and Resume with Deal Sheet.pdf

Justin,

I hope all is well in DC. I am a friend of Stephen Vaden's from Houston and I will be in Washington next week to meet Ex. 6

I know you are very busy and may not be available—and also that we have never met—but I would very much appreciate the opportunity to meet you while I'm there. I understand that EPA has just hired an unprecedented third political Deputy GC; therefore, Ex. 6 Ex. 6

Would you happen to be free on Tuesday or Wednesday? I will be working from the DC office next week and would be happy to accommodate any time next week that would work for you. I also have a line in with David Fotouhi, maybe we could all get together for coffee.

Ex. 6
Ex. 6 I would very much look forward to meeting you!

Kind regards,
Marcella

Marcella Burke
Ex. 6

Message

From: Elliott, Don [DElliott@cov.com]
Sent: 6/16/2017 5:26:07 PM
To: Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]
Subject: Re: Follow Up to Request for Meeting for MGP

Thank you for the update.

Don Elliott

On Jun 16, 2017, at 13:14, Schwab, Justin <schwab.justin@epa.gov<mailto:schwab.justin@epa.gov>> wrote:

We're moving this through and should be able to schedule a meeting shortly (perhaps as early as next week), but the appropriate attendees for that meeting are still being worked out. Please let me know if you have further questions.

Sent from my iPhone

On Jun 14, 2017, at 3:28 PM, Schwab, Justin <schwab.justin@epa.gov<mailto:schwab.justin@epa.gov>> wrote:

Will follow up

Sent from my iPhone

On Jun 14, 2017, at 3:20 PM, Elliott, Don <DElliott@cov.com<mailto:DElliott@cov.com>> wrote:

Hi Justin,

Great to see you and Gerald for lunch last Friday. Let's do it again soon.

On another topic, can you tell me anything about where things stand and when we might be hearing back from you on the subject that I wrote you about below? My clients at MGP are pushing me for when we might hear back from EPA Headquarters, as they have a decision coming up soon (June 26) about whether to go forward with their plans to build an additional whiskey aging warehouse in Indiana, or to relocate it to Louisville, Kentucky instead because it is in a different EPA Region that takes a different position on these issues.

As I am sure that you appreciate, one of the main rationales for the regional consistency rules under the CAA was to avoid just this type of situation where inconsistent positions by Regions IV and V cause economic development to be re-directed from one state to another. Some in the Indiana state government and Congressional delegation are getting rather steamed about this situation and I have heard that some of them intend to reach out to Administration Pruitt about it although I don't know when.

Any word about timing that I can share with the client?

Regards,

Don

E. Donald Elliott

Covington & Burling LLP
One CityCenter, 850 Tenth Street, NW
Washington, DC 20001-4956
Ex. 6 delliott@cov.com<mailto:delliott@cov.com>
www.cov.com<http://www.cov.com>

<image002.jpg>

From: Elliott, Don
Sent: Monday, June 05, 2017 2:25 PM
To: Justin Schwab (schwab.justin@epa.gov<mailto:schwab.justin@epa.gov>)
Subject: Request for Meeting

Justin,

Please consider this a request for a meeting with you and whoever else you consider appropriate concerning the matters outlined in the attached letter. We suggest that someone from OAQPS might also be interested, perhaps Peter Tsirigotis, and also OECA.

In essence, we want to discuss with you whether the Trump Administration is abruptly changing EPA's 17-year long policy that the "angel's share" of alcohol that leaks out of wooden whiskey barrels during the traditional natural aging process cannot be controlled without unacceptable effects on product quality, and if so, whether the agency may do so without any notice or opportunity for comment on the change but instead merely by bringing an enforcement case out of the blue without prior fair notice to the regulated community.

We represent MGP Ingredients, Inc. which received the attached Notice and Finding of Violation for its Lawrenceville, Indiana bourbon aging warehouse from Region V. Region V's position on this directly contradicts that of the other regions, including Region IV, as we will outline at the meeting. I would be accompanied by my co-counsel, Tony Sullivan of Barnes & Thornburg in Indianapolis, as well as a company representative.

Please let me know what dates you are available. The only dates when I have to be out of town are June 28-29 Ex. 6

Don

E. Donald Elliott

Covington & Burling LLP
One CityCenter, 850 Tenth Street, NW, Washington, DC 20001
Ex. 6 DElliott@cov.com<mailto:DElliott@cov.com>
www.cov.com<http://www.cov.com>

<image003.png><http://www.cov.com/>

Message

From: Elliott, Don [DElliott@cov.com]
Sent: 8/2/2017 7:04:48 PM
To: Tennenbaum, Susan [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=de2d44897c8c4b22a02b750372239462-STennenb]
CC: St. Peter, Marie [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=6d37fa9e60034d1da50f6269682703d8-MStPeter]; Fried, Gregory [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=960451767a6a44969c7647c875806e38-Gfried]
Subject: Region V Visit to MGPI

I have done so.

Don Elliott

E. Donald Elliott

Covington & Burling LLP
One CityCenter, 850 Tenth Street, NW, Washington, DC 20001
Ex. 6 | DElliott@cov.com
www.cov.com

COVINGTON

From: Tennenbaum, Susan [mailto:Tennenbaum.Susan@epa.gov]
Sent: Wednesday, August 02, 2017 2:49 PM
To: Elliott, Don
Cc: St. Peter, Marie; Fried, Gregory
Subject: Visit to MGPI

Don:

This is just to let you know that EPA plans on visiting MGPI on Tuesday, August 8th. We're not sure of the time, but it will probably be around 9 am. Please inform MGPI management of our plans.

Thank you in advance for your cooperation.

Susan M. Tennenbaum
Associate Regional Counsel
U.S. EPA - Region 5
77 West Jackson Blvd., C-14J
Chicago, IL 60604
312-886-0273

Message

From: Elliott, Don [DElliott@cov.com]
Sent: 6/5/2017 6:24:58 PM
To: Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]
Subject: Request for Meeting
Attachments: Elliott Letter to Tennenbaum.5 25 17.pdf; 2000 OAR Letter.pdf; 0187_001.pdf

Justin,

Please consider this a request for a meeting with you and whoever else you consider appropriate concerning the matters outlined in the attached letter. We suggest that someone from OAQPS might also be interested, perhaps Peter Tsirigotis, and also OECA.

In essence, we want to discuss with you whether the Trump Administration is abruptly changing EPA's 17-year long policy that the "angel's share" of alcohol that leaks out of wooden whiskey barrels during the traditional natural aging process cannot be controlled without unacceptable effects on product quality, and if so, whether the agency may do so without any notice or opportunity for comment on the change but instead merely by bringing an enforcement case out of the blue without prior fair notice to the regulated community.

We represent MGP Ingredients, Inc. which received the attached Notice and Finding of Violation for its Lawrenceville, Indiana bourbon aging warehouse from Region V. Region V's position on this directly contradicts that of the other regions, including Region IV, as we will outline at the meeting. I would be accompanied by my co-counsel, Tony Sullivan of Barnes & Thornburg in Indianapolis, as well as a company representative.

Please let me know what dates you are available. The only dates when I have to be out of town are June 28-29 Ex. 6
Ex. 6

Don

E. Donald Elliott

Covington & Burling LLP
One CityCenter, 850 Tenth Street, NW, Washington, DC 20001
Ex. 6 DElliott@cov.com
www.cov.com

COVINGTON

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DEC 21 2016

REPLY TO THE ATTENTION OF:

Randy Graves
Environmental, Health and Safety Manager
MGPI of Indiana, LLC
7 Ridge Avenue
Lawrenceburg, Indiana 47025

Re: Notice and Finding of Violation
MGPI of Indiana, LLC
Dearborn, Indiana

Dear Mr. Graves:

The U.S. Environmental Protection Agency is issuing the enclosed Notice of Violation and Finding of Violation (NOV/FOV) to MGPI of Indiana, LLC (MGPI) under Section 113(a)(1) and (a)(3) of the Clean Air Act (CAA or Act), 42 U.S.C. § 7413(a)(1) and (a)(3). EPA has determined that you have violated and are continuing to violate the Act's Non-Attainment New Source Review requirements under Part D of the Act, 42 U.S.C. §§ 7501 *et seq.* and the Indiana State Implementation Plan (SIP) at your Lawrenceburg, Indiana facility.

Section 113(a) of the Act gives us several enforcement options. These options include issuing an administrative compliance order, issuing an administrative penalty order and bringing a judicial civil or criminal action.

We are offering MGPI an opportunity to confer with us about the violations alleged in the NOV/FOV. The conference will give you an opportunity to present information on the specific findings of violation, any efforts you have taken to comply and the steps you will take to prevent future violations. In addition, in order to make the conference more productive, we encourage you to submit to us information responsive to the NOV/FOV prior to the conference date.

Please plan for your facility's technical and management personnel to attend the conference to discuss compliance measures and commitments. You may have an attorney represent you at this conference. EPA is also including a Small Business Resources Information Sheet for your reference.

The EPA contact in this matter is Marie St. Peter, Environmental Engineer. You may call her at (312) 886-4746 to request a conference. You should make the request within 10 calendar days following receipt of this letter. We should hold any conference within 30 calendar days following receipt of this letter.

Sincerely,

Edward Nam
Director
Air and Radiation Division

cc: Phil Perry, Chief
Compliance and Air Enforcement, IDEM

Chief Environmental Compliance Officer
MGP Ingredients, Inc.
Atchison, Kansas

enclosures: Notice of Violation and Finding of Violation EPA-5-17-IN-03
Small Business Resources Information Sheet

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:	)	
	)	
MGPI of Indiana	)	**NOTICE OF VIOLATION AND**
Lawrenceburg, Indiana	)	**FINDING OF VIOLATION**
	)	**EPA-5-17-IN-03**
Proceedings Pursuant to	)	
Section 113(a)(1) and (a)(3) of the	)	
Clean Air Act, 42 U.S.C.	)	
§ 7413(a)(1) and (a)(3)	)	

NOTICE AND FINDING OF VIOLATION

The U.S. Environmental Protection Agency (EPA) is issuing this Notice of Violation under Section 113(a)(1) and (a)(3) of the Clean Air Act (CAA or the Act), 42 U.S.C. § 7413(a)(1) and (a)(3). EPA finds that MGPI of Indiana (MGPI or you) has violated and continues to violate the Non-Attainment New Source Review requirements of the Act and the Indiana State Implementation Plan (SIP) at its Lawrenceburg, Indiana Distillery (Lawrenceburg Distillery or Facility) as follows:

Statutory and Regulatory Background

Non-Attainment New Source Review

1. The Non-Attainment New Source Review (NNSR) provisions of Part D of Title I of the Act require preconstruction review and permitting for modifications of stationary sources. *See* 42 U.S.C. § 7502 and the supporting regulations at 40 C.F.R. Part 51, Appendix S. Pursuant to these regulations, if a major stationary source located in a non-attainment area is planning to make a major modification, then that source must obtain an NNSR permit before beginning actual construction. To obtain this permit, the source must, among other things, undergo a technology review and apply the Lowest Achievable Emission Reduction (LAER); obtain offset credits; perform a source impact analysis; perform an air quality analysis and modeling; submit appropriate information; and conduct additional analyses as required.

2. On February 16, 1982, EPA approved Indiana's NNSR SIP rules, which were incorporated into Section 19 of the Indiana Air Pollution Code (APC 19). 47 *Fed. Reg.* 6621 (February 16, 1982). APC 19 governed the preconstruction review of modifications of facilities in nonattainment areas that occurred prior to December 6, 1994, when subsequent regulations went into effect. The definitions applicable to the APC 19 NNSR provisions were codified at 325 Indiana Administrative Code (IAC) 1-1. 46 *Fed. Reg.* 54941 (November 5, 1981), and became effective on December 6, 1981.

3. On February 25, 1994, Indiana submitted revisions to its SIP to satisfy the new NNSR requirements of the 1990 CAA Amendments. On October 7, 1994, EPA approved

Sections 2-1 and 2-3 of Chapter 326 of the Indiana Administrative Code (326 IAC 2-1, 2-3) as SIP revisions replacing APC 19. 59 *Fed. Reg.* 51108 (effective December 6, 1994). 40 C.F.R. § 52.800(c)(94). Included in the NNSR SIP revisions were changes to the definitions previously codified at 325 IAC 1-1; the definitions now applicable to NNSR in Indiana appear at 326 IAC 2-3-1. All citations to the NNSR regulations herein refer to the provisions of the Indiana SIP as applicable at the time of the project.

4. 326 IAC 2-3-2(a) provides that NNSR regulations "appl[y] to new major stationary sources or major modifications constructed in an area designated, as of the date of submittal of a complete application, as nonattainment in 326 IAC 1-4, for a pollutant for which the stationary source or modification is major."

5. 326 IAC 2-3-3(a)(7) provides that construction of a major modification shall only begin after the applicant "obtain[s] the necessary preconstruction approvals . . . [and meets all the permit requirements] specified in 326 IAC 2-5.1 or 326 IAC 2-7, as applicable."

6. The Indiana SIP and NNSR regulations define "major modification" as "any physical change in, or change in the method of operation of, a major stationary source that would result in a significant emissions increase and a significant net emissions increase of a regulated NSR pollutant from the major stationary source." 326 IAC 2-3-1(y). *See also* 40 C.F.R. § 51.165(a)(1)(v)(A)(1) and (A)(2).

7. The Indiana SIP and NNSR regulations define "regulated NSR pollutant" as, among other things, "any pollutant that is a constituent or precursor of a general pollutant." 326 IAC 2-3-1(mm)(3). *See also* 40 C.F.R. § 51.165(a)(1)(xxxvii)(C).

8. The Indiana SIP and NNSR regulations further define that for the purposes of NNSR, that "regulated NSR pollutant" includes "nitrogen oxides or any VOC." 326 IAC 2-3-1(mm). 40 C.F.R. § 51.165(a)(1)(xxxvii)(C)(*1*).

9. The Indiana SIP and NNSR regulations define "major stationary source" as, any stationary source of air pollutants that emits or has the potential to emit one hundred (100) tons per year of any regulated NSR pollutant. 326 IAC 2-3-1(z)(1). 40 C.F.R. § 51.165(a)(1)(iv)(A)(*1*).

10. The Indiana SIP and NNSR regulations define "significant," in relation to ozone, "in reference to a net emissions increase … a rate of emissions that would equal or exceed … the following [rate]: … ozone … 40 tons per year of volatile organic compounds (VOC) or oxides of nitrogen." 326 IAC 2-3-1(pp). 40 C.F.R. § 51.165(a)(1)(x)(A).

11. The Indiana SIP and NNSR regulations define "significant emissions increase" for VOCs as "an increase in emissions that is significant as defined [in the applicable subsection] for that pollutant." 326 IAC 2-3-1(qq). 40 C.F.R. § 51.165(a)(1)(xxvii).

12. The Indiana SIP and NNSR regulations define "fugitive emissions" as "those emissions that could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening." 326 IAC 2-3-1(u). 40 C.F.R. § 51.165(a)(1)(ix).

13. 326 IAC 2-3-3(a)(2) provides that "prior to the issuance of a construction permit to a source subject to this rule, the applicant shall . . . apply emission limitation devices or techniques to the proposed construction or modification such that the LAER for the applicable pollutant will be achieved." 40 C.F.R. § 51.165(a)(2)(i).

14. The Indiana SIP and NNSR regulations define "LAER" as "for any source, the more stringent rate of emissions based on the most stringent emissions limitation of the following:

I. Contained in the implementation plan of any state for the class or category of stationary source unless the owner or operator of the proposed stationary source demonstrates that the limitations are not achievable.

II. Achieved in practice by the class or category of stationary source. This limitation, when applied to a modification, means the LAER for the new or modified emissions unit within the stationary source. In no event shall the application of the LAER allow a proposed new or modified stationary source to emit any pollutant in excess of the amount allowable under applicable new source standards of performance." 326 IAC 2-3-1(x); *See also* 40 C.F.R. § 51.165(a)(1)(xiii).

Title V

15. Section 502(a) of the Act, 42 U.S.C. § 7661a(a), provides that no person may operate a major source without a Title V permit after the effective date of any permit program approved or promulgated under Title V of the Act. EPA first promulgated regulations governing state operating permit programs on July 21, 1992. *See* 57 Fed. Reg. 32295; 40 C.F.R. Part 70. EPA promulgated regulations governing the federal operating permit program on July 1, 1996. *See* 61 Fed. Reg. 34228; 40 C.F.R. Part 70.

16. On December 4, 2001, EPA granted full approval of Indiana's Title V Clean Air Act Permit Program, effective November 30, 2001. *See* 66 Fed. Reg. 62969.

17. On March 16, 2015, EPA approved Indiana's Title V construction permit rule, replacing Indiana's previous construction permit rules codified at 326 IAC 2-1 with 326 IAC 2-7-10.5. *See* 80 Fed. Reg. 13493.

18. Section 503 of the Act, 42 U.S.C. § 7661b, sets forth the requirement to submit a timely, accurate, and complete application for a permit, including information required to be submitted with the application.

19. Section 504(a) of the Act, 42 U.S.C. § 7661c(a), requires that each Title V permit include enforceable emission limitations and standards, a schedule of compliance, and other conditions necessary to assure compliance with applicable requirements, including those contained in a state SIP. 42 U.S.C. § 7661c(a).

20. 40 C.F.R. § 70.1(b) provides that: "All sources subject to these regulations shall have a permit to operate that assures compliance by the source with all applicable requirements." *See* 326 IAC 2-7-2.

21. 40 C.F.R. § 70.2 defines "applicable requirement" to include, "(1) Any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the Act that implements the relevant requirements of the Act, including revisions to that plan promulgated in part 52 of this chapter…" *See* 326 IAC 2-7-1(6).

22. 40 C.F.R. § 70.7(b) provides that no source subject to 40 C.F.R. Part 70 requirements may operate without a permit as specified in the Act. *See also* IAC 2-7-2.

23. 40 C.F.R. § 70.5(a) and (c) require timely and complete permit applications for Title V permits with required information that must be submitted and 40 C.F.R. § 70.6 specifies required permit content. *See also* 326 IAC 2-7-2.

24. 40 C.F.R. § 70.5(b) provides that: "Any applicant who fails to submit any relevant facts or who has submitted incorrect information in a permit application shall, upon becoming aware of such failure or incorrect submittal, promptly submit such supplementary facts or corrected information. In addition, an applicant shall provide additional information as necessary to address any requirements that become applicable to the source after the date it filed for a complete application but prior to release of a draft permit." *See also* 326 IAC 2-7-2.

25. 326 IAC 2-7-10.5(a) requires that an owner or operator of a source with a Title V permit (Title V source) proposing to construct a new emissions unit must submit a request for a modification approval in accordance with 326 IAC 2-7-10.5.

26. 326 IAC 2-7-10.5(g) requires the owner or operator of a Title V source planning to complete a modification that, among other things, increases potential VOC emissions by 25 tons per year or more must have their approval request processed according to 327 IAC 2-7-10.5(h).

27. 327 IAC 2-7-10.5(h)(2) prohibits the construction of any applicable modification until the administrator has issued a modification approval, expect as provided in 326 IAC 2-13.

28. 327 IAC 2-7-10.5(h)(4) provides that a modification approval may only be issued if, among other things, the conditions of the modification approval provide for compliance with all applicable requirements, which includes but is not limited to, the NNSR regulations.

Factual Background

29. MGPI is a wholly owned subsidiary of MGP Ingredients, Inc. a Kansas corporation with a place of business in Lawrenceburg, Indiana.

30. MGPI is a "person" as that term is defined in Section 302(e) of the Act, 42 U.S.C. § 7602(e).

31. MGPI is the owner and operator of a distillery located at 7 Ridge Avenue, Lawrenceburg, Indiana (Lawrenceburg Distillery or the Facility).

32. The Lawrenceburg Distillery is located in Dearborn County, Indiana. Dearborn County is located in an area which has been classified as nonattainment for the 2008 Ozone National Ambient Air Quality Standards (NAAQS) from July 20, 2012 to the present. 77 Fed. Reg. 30087.

33. The Lawrenceburg Distillery operates under Title V operating permit no. 029-32119-00005, which the Indiana Department of Environmental Management (IDEM) issued to MGPI on June 6, 2014.

34. The Lawrenceburg Distillery is a "major stationary source," as defined at 326 IAC 2-3-1(z)(1) and 40 C.F.R. § 51.165(a)(1)(xiii), because it has a potential to emit more than 100 tons per year of VOCs.

35. The Lawrenceburg Distillery produces barrel-aged alcohol which requires the aging of alcohol in barrels stored in aging warehouses, herein referred to in its entirety as the alcohol aging process.

36. The alcohol aging process results in VOC emissions.

37. MGPI does not control emissions resulting from the alcohol aging process.

38. On May 17, 2016, EPA conducted a CAA inspection (the inspection) at the Facility.

39. During the inspection, MGPI personnel informed EPA that MGPI had constructed several new aging warehouses in 2015 (2015 aging warehouses) at the Lawrenceburg Distillery to increase the capacity of its alcohol aging process.

40. During the inspection, EPA noticed that additional aging warehouses (2016 aging warehouses) were being constructed.

41. On September 6, 2016, IDEM received an air permit application (2016 permit application) from MGPI proposing the construction of ten new aging warehouses (new aging warehouses) to increase the capacity of its alcohol aging process by 503,600 barrels.

42. MGPI's 2016 permit application is for a significant source modification to operating permit 029-32119-00005 and does not propose, among other things, the implementation of LAER, emissions offsets, or the performance of an air quality analysis and modeling, as required by the NNSR regulations and 326 IAC 2-3.

43. MGPI's 2016 permit application includes the following table, which describes the installation dates of the proposed new aging warehouses, their capacities, and their vent IDs:

Unit ID	Description	Installation Date	Maximum Capacity (barrels)	Stack/Vent ID
EU-770	Warehouse IC	2015	7,600	707
EU-771	Warehouse K	2015	14,000	706
EU-772	Warehouse O	2015	47,000	709
EU-773	Warehouse P	2016	65,000	710
EU-774	Warehouse Q	2016	46,000	711
EU-775	Warehouse F	2016	60,000	712
EU-776	Warehouse H	2017	60,000	713
EU-777	Warehouse V	2017	60,000	714
EU-778	Warehouse 3XProfab	2018	108,000	715
EU-779	Warehouse 1XProfab	2019	36,000	716

44. MGPI's 2016 permit application states that the 2015 aging warehouses and 2016 aging warehouses began operating in 2015 and 2016, respectively.

45. MGPI's 2016 permit application states that the construction of all ten new aging warehouses is one project.

46. MGPI's 2016 permit application states that the increase in potential total emissions from the new aging warehouses is 1737.42 tons of VOCs.

47. The VOCs released during the alcohol aging process are not fugitive, as they can reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

48. MGPI did not apply for an NNSR permit prior to beginning construction of the new aging warehouses, and has still not applied for an NNSR permit.

49. MGPI's 2016 permit application states that the construction of the 2015 and 2016 whiskey warehouses resulted in the following potential emissions:

Unit ID	Description	Installation Date	Maximum Capacity (barrels)	VOC Emission Factor (lbs /barrel/year)	VOC Emissions (tons/year)
EU-770	Warehouse IC	2015	7,600	6.9	26.22
EU-771	Warehouse K	2015	14,000	6.9	48.3
EU-772	Warehouse O	2015	47,000	6.9	162.15
EU-773	Warehouse P	2016	65,000	6.9	224.25
EU-774	Warehouse Q	2016	46,000	6.9	158.7
EU-775	Warehouse F	2016	60,000	6.9	207

50. MGPI did not submit to IDEM a request for approval of its modification prior to commencing construction of the new aging warehouses, as required pursuant to 326 IAC 2-7-10.5(h)(2).

Violations

51. The construction of the new aging warehouses referred to in paragraphs 39-48, above, constitutes a "major modification" under the NNSR regulations and 326 IAC 2-3 of the Indiana SIP, because the emissions resulting from the new aging warehouses are not fugitive and will result in a significant emissions increase and a significant net emissions increase.

52. For the modification referred to in Paragraphs 39-48, above, MGPI failed to obtain a NNSR permit as required by the NNSR regulations and 326 IAC 2-3 of the Indiana SIP.

53. MGPI is in violation of NNSR requirements, Part D of the Act, 42 U.S.C. § 7502, and 326 IAC 2-3 of the Indiana SIP for construction of a major modification to an existing major source at its Lawrenceburg Distillery without applying for or obtaining an NNSR permit, and for operating the modified facilities without installing appropriate emission control equipment in accordance with a LAER analysis.

54. For the construction referred to in Paragraphs 49-50, above, MGPI is in violation of 326 IAC 2-7-10.5(h)(2) for failing to obtain approval of its modification prior to commencing construction.

Environmental Impact of Violations

55. These violations have caused or can cause excess emissions of VOCs, which are precursors to ozone. Breathing ozone contributes to a variety of health problems including chest pain, coughing, throat irritation, and congestion. Ground-level ozone can reduce lung function and inflame lung tissue. Repeated exposure may permanently scar lung tissue.

12/21/16
Date

Edward Nam
Director
Air and Radiation Division

United States Environmental Protection Agency

Office of Enforcement and Compliance Assurance (2201A)
EPA-300-F-11-006 June 2011

U.S. EPA Small Business Resources Information Sheet

The United States Environmental Protection Agency provides an array of resources, including workshops, training sessions, hotlines, websites and guides, to help small businesses understand and comply with federal and state environmental laws. In addition to helping small businesses understand their environmental obligations and improve compliance, these resources will also help such businesses find cost-effective ways to comply through pollution prevention techniques and innovative technologies.

EPA's Small Business Websites

Small Business Environmental Homepage - www.smallbiz-enviroweb.org

Small Business Gateway - www.epa.gov/smallbusiness

EPA's Small Business Ombudsman - www.epa.gov/sbo or 1-800-368-5888

EPA's Compliance Assistance Homepage
www.epa.gov/compliance/assistance/business.html

This page is a gateway to industry and statute-specific environmental resources, from extensive web-based information to hotlines and compliance assistance specialists.

EPA's Compliance Assistance Centers
www.assistancecenters.net

EPA's Compliance Assistance Centers provide information targeted to industries with many small businesses. They were developed in partnership with industry, universities and other federal and state agencies.

Agriculture
www.epa.gov/agriculture/

Automotive Recycling
www.ecarcenter.org

Automotive Service and Repair
www.ccar-greenlink.org or 1-888-GRN-LINK

Chemical Manufacturing
www.chemalliance.org

Construction
www.cicacenter.org or 1-734-995-4911

Education
www.campuserc.org

Food Processing
www.fpeac.org

Healthcare
www.hercenter.org

Local Government
www.lgean.org

Metal Finishing
www.nmfrc.org

Paints and Coatings
www.paintcenter.org

Printed Wiring Board Manufacturing
www.pwbrc.org

Printing
www.pneac.org

Ports
www.portcompliance.org

U.S. Border Compliance and Import/Export Issues
www.bordercenter.org

Hotlines, Helplines and Clearinghouses

www.epa.gov/epahome/hotline.htm

EPA sponsors many free hotlines and clearinghouses that provide convenient assistance regarding environmental requirements. Some examples are:

Antimicrobial Information Hotline
info-antimicrobial@epa.gov or 1-703-308-6411

Clean Air Technology Center (CATC) Info-line
www.epa.gov/ttn/catc or 1-919-541-0800

Emergency Planning and Community Right-To-Know Act
www.epa.gov/superfund/resources/infocenter/epcra.htm or 1-800-424-9346

EPA Imported Vehicles and Engines Public Helpline
www.epa.gov/otaq/imports or 734-214-4100

National Pesticide Information Center
www.npic.orst.edu/ or 1-800-858-7378

National Response Center Hotline - to report oil and hazardous substance spills
www.nrc.uscg.mil or 1-800-424-8802

Pollution Prevention Information Clearinghouse (PPIC)
www.epa.gov/opptintr/ppic or 1-202-566-0799

Safe Drinking Water Hotline
www.epa.gov/safewater/hotline/index.html or 1-800-426-4791

Stratospheric Ozone Protection Hotline
www.epa.gov/ozone or 1-800-296-1996

Toxic Substances Control Act (TSCA) Hotline
tsca-hotline@epa.gov or 1-202-554-1404

Wetlands Information Helpline
www.epa.gov/owow/wetlands/wetline.html or 1-800-832-7828

State and Tribal Web-Based Resources

State Resource Locators
www.envcap.org/statetools

The Locators provide state-specific contacts, regulations and resources covering the major environmental laws.

State Small Business Environmental Assistance Programs (SBEAPs)
www.smallbiz-enviroweb.org

State SBEAPs help small businesses and assistance providers understand environmental requirements and sustainable business practices through workshops, trainings and site visits. The website is a central point for sharing resources between EPA and states.

EPA's Tribal Compliance Assistance Center
www.epa.gov/tribalcompliance/index.html

The Center provides material to Tribes on environmental stewardship and regulations that might apply to tribal government operations.

EPA's Tribal Portal
www.epa.gov/tribalportal/

The Portal helps users locate tribal-related information within EPA and other federal agencies.

EPA Compliance Incentives

EPA provides incentives for environmental compliance. By participating in compliance assistance programs or voluntarily disclosing and promptly correcting violations before an enforcement action has been initiated, businesses may be eligible for penalty waivers or reductions. EPA has two such policies that may apply to small businesses:

EPA's Small Business Compliance Policy
www.epa.gov/compliance/incentives/smallbusiness/index.html

This Policy offers small businesses special incentives to come into compliance voluntarily.

EPA's Audit Policy
www.epa.gov/compliance/incentives/auditing/auditpolicy.html

The Policy provides incentives to all businesses that voluntarily discover, promptly disclose and expeditiously correct their noncompliance.

Commenting on Federal Enforcement Actions and Compliance Activities

The Small Business Regulatory Enforcement Fairness Act (SBREFA) established a SBREFA Ombudsman and 10 Regional Fairness Boards to receive comments from small businesses about federal agency enforcement actions. If you believe that you fall within the Small Business Administration's definition of a small business (based on your North American Industry Classification System designation, number of employees or annual receipts, as defined at 13 C.F.R. 121.201; in most cases, this means a business with 500 or fewer employees), and wish to comment on federal enforcement and compliance activities, call the SBREFA Ombudsman's toll-free number at 1-888-REG-FAIR (1-888-734-3247), or go to their website at www.sba.gov/ombudsman.

Every small business that is the subject of an enforcement or compliance action is entitled to comment on the Agency's actions without fear of retaliation. EPA employees are prohibited from using enforcement or any other means of retaliation against any member of the regulated community in response to comments made under SBREFA.

Your Duty to Comply

If you receive compliance assistance or submit a comment to the SBREFA Ombudsman or Regional Fairness Boards, you still have the duty to comply with the law, including providing timely responses to EPA information requests, administrative or civil complaints, other enforcement actions or communications. The assistance information and comment processes do not give you any new rights or defenses in any enforcement action. These processes also do not affect EPA's obligation to protect public health or the environment under any of the environmental statutes it enforces, including the right to take emergency remedial or emergency response actions when appropriate. Those decisions will be based on the facts in each situation. The SBREFA Ombudsman and Fairness Boards do not participate in resolving EPA's enforcement actions. Also, remember that to preserve your rights, you need to comply with all rules governing the enforcement process.

EPA is disseminating this information to you without making a determination that your business or organization is a small business as defined by Section 222 of the Small Business Regulatory Enforcement Fairness Act or related provisions.

CERTIFICATE OF MAILING

I, Kathy Jones, certify that I sent a Notice of Violation, No. EPA-5-17-IN-03, by Certified Mail, Return Receipt Requested, to:

Randy Graves, EHS Manager
MGPI of Indiana, LLC
7 Ridge Avenue
Lawrenceburg, Indiana 47025 7014 2870 0001 9578 8926

Steve Glaser, Vice President of Production and Engineering
MGP Ingredients, Inc.
P.O. Box 130
Atchison, Kansas 66002 7014 2870 0001 9578 8933

I also certify that I sent copies of the Notice of Violation by e-mail to:

Phil Perry, Chief
Air Compliance Branch
Indiana Department of Environmental Management
pperry@idem.in.gov

On the 22 day of December 2016.

for
Kathy Jones
Program Technician
AECAB, PAS

CERTIFIED MAIL RECEIPT NUMBER: _____

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT 23 2000

OFFICE OF
AIR AND RADIATION

The Honorable Robert C. Smith
Chairman, Committee on Environment
& Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter is in response to your question as to whether the Environmental Protection Agency (EPA) has identified reasonably available control technology (RACT) for ethanol emissions from alcohol beverage aging warehouses. One control technology which has been suggested in this regard is carbon adsorption which conceivably could be applied to the warehouse ventilation exhaust to capture ethanol fumes. However, in order to capture the warehouse fumes it may be necessary to modify the air flowing through the warehouse which could affect temperature, humidity and ventilation in the warehouse. The industry has raised questions about whether these changes would adversely affect the product quality.

Due to this unresolved issue, EPA has not, at this time, declared that such add-on control devices are RACT for alcohol beverage aging warehouses. Nor has EPA currently identified any other available technology which it considers to be RACT for alcohol beverage aging warehouses. Therefore, EPA is not requiring states to control these sources in order to meet ozone control state implementation plan requirements.

I appreciate this opportunity to be of service and trust that this information will be helpful to you.

Sincerely,

John C. Beale
Deputy Assistant Administrator
for Air and Radiation

cc: The Honorable Max Baucus

EXHIBIT
Witness 10

COVINGTON

BEIJING BRUSSELS DUBAI JOHANNESBURG LONDON
LOS ANGELES NEW YORK SAN FRANCISCO SEOUL
SHANGHAI SILICON VALLEY WASHINGTON

Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
T +1 202 662 6000

By Electronic and U.S. Mail

May 26, 2017

Susan M. Tennenbaum
Associate Regional Counsel
U.S. EPA - Region 5
77 West Jackson Blvd., C-14J
Chicago, IL 60604

Re: MGPI of Indiana, LLC Notice and Finding of Violation

Dear Susan:

As you know, I was recently brought on board by MGP Ingredients (MGP) to explore the possibility of finding a mutually acceptable settlement to your December 21, 2016 Notice and Finding of Violation issued to MGPI of Indiana, LLC (MGPI). My co-counsel Tony Sullivan and I were surprised and very disappointed with your May 12 email, which we interpreted as meaning that EPA Region V did not want to meet with us unless we agreed in advance to propose a program of controls on whiskey aging warehouses.

In what follows, we explain why Region V cannot via notice of violation unilaterally change EPA's long-stated policy that the so-called "angels' share" that leaks out of the barrels during whiskey aging are fugitive emissions that are not subject to control.

The Fair Notice Doctrine Precludes Enforcement Prior to an Announcement by EPA Headquarters of a Change in Position. Under the fair notice doctrine, which is described in more detail below, any federal agency, including EPA, has an obligation to tell the regulated community the "rules of the game" in advance of bringing an enforcement proceeding for allegedly violating them. As outlined below, as of the date of the purported "violation," *all* of EPA's notices and statements of position to the regulated community, including the RACT/BACT/LAER clearinghouse, continued the Agency's long-standing policy as stated in the 2000 Letter from the Deputy Assistant Administrator for Air and Radiation (copy attached) that the "angels' share" that leaks out of wooden barrels naturally during whiskey aging are fugitive emissions that are not subject to control without unacceptable effects on product quality.

There has been no announcement to the regulated community of any change in this long-standing position by EPA Headquarters, nor has there been an opportunity for notice and comment on the recent efforts by Gallo to control emissions from a brandy aging warehouse in California. In fact, even the San Joaquin Valley Air Pollution Control District, which promulgated the rule governing the Gallo facility, expressly acknowledged that it "understands that the nature of whiskey aging operations differs from wine and brandy aging. Specifically, the ambient conditions, such as storage temperature and humidity, as well as seasonal variations, are important factors in the whiskey aging process. All aging processes[] depend[] upon the interaction of product in oak barrels, whiskey aging operations strive for a particular blend of temperature, humidity, and ventilation, leading to different types of warehouse. Therefore,

whiskey aging is not considered or included in this rule development process." Final Draft Staff Report at 3 (Sept. 17, 2009) (citing EPA's AP-42 factors).[1]

At a minimum, before changing its position, EPA would have an obligation to determine, and to make available for public comment and criticism, whether there has been an adverse effect on product quality in the Gallo experiment or whether the results, even if successful, can be projected to the quite different process of traditional natural aging of Bourbon whiskey, which we are advised is very different than brandy. Indeed, EPA recognizes the difference between brandy and whiskey warehouses, as it has an AP-42 emission factor for brandy and wine aging separate from the factor used for whiskey aging. *Compare* EPA Office of Air Quality Planning & Standards, Emission Factor Documentation for AP-42, Section 9.12.2 Standards of Performance for New Stationary Sources (Oct. 1995) (standards for wine and brandy) *with*, Section 9.12.3 Standards of Performance for New Stationary Sources (Mar. 1997) (standards for other distilled spirits). We do understand that certain Region V staff apparently disagree with all the Agency's prior conclusions, and also with those of their colleagues in other regions, but bringing an enforcement case based on isolated opinions alone, rather than what the Agency has officially told the regulated community consistently in the past is simply impermissible. As the late Justice Scalia put it for an unanimous Supreme Court,

> "It is hard to imagine a more violent breach of [the requirement of reasoned decision-making] than applying a rule of primary conduct ... which is in fact different than the rule or standard formally announced."[2]

We are bringing this to your attention first in the hopes that you will be persuaded to drop the Notice and Finding of Violation (NFV) and advise your colleagues to work through normal channels of consultation—including with the regulated community—to try to change the agency's position if you believe a policy change is appropriate. It is also noteworthy that at the time of the alleged violations, the area was actually in compliance with the NAAQS for ozone, as EPA later acknowledged by re-designating it as attainment. 82 Fed. Reg. 16,940 (Apr. 7, 2017). That fact alone would justify an exercise of prosecutorial discretion not to bring a case seeking to impose LAER. However, if you are determined to proceed with the NFV even though EPA Headquarters has not notified the regulated community that it is reconsidering or changing its long-standing position, we will of course be forced to elevate the issue with the political leadership of the agency, including OAR, OAQPS, OECA, OGC, the Department of Justice, and if necessary, in court.

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[1] *Available at* https://www.valleyair.org/Board_meetings/gb/agenda_minutes/Agenda/2009/September/Agenda_Item_9_Sep_17_2009.pdf

[2] *Allentown Mack Sales and Service Inc. v. NLRB*, 522 U.S. 359, 374 (1998).

I. The Fair Notice Doctrine

"It is a cardinal rule of administrative law" that a regulated entity must be given fair notice of "what conduct is prohibited or required of it." *Wisconsin Res. Prot. Council v. Flambeau Min. Co.*, 727 F.3d 700, 707 (7th Cir. 2013) (quotation marks omitted). "In the absence of notice . . . an agency may not deprive a party of property by imposing civil or criminal liability." *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995).

An agency has "has fairly notified a petitioner" if "by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, *with ascertainable certainty*, the standards with which the agency expects parties to conform." *Flambeau*, 727 F.3d at 708 (quotation marks omitted) (emphasis added). Importantly, an agency's position can be entirely permissible, but nevertheless fall afoul of the fair notice requirement if the agency has not provided adequate notice. *Gen. Elec.*, 53 F.3d at 1325 ("We conclude that EPA's interpretation of those regulations is permissible, but because the regulations did not provide GE with fair warning of the agency's interpretation, we vacate the finding of liability and set aside the fine."). The consistency of an agency's public proclamations on an issue is crucial to providing notice of what is required. *See United States v. Lachman*, 387 F.3d 42, 57 (1st Cir. 2004) ("When the agency itself issues contradictory or misleading public interpretations of a regulation, there may be sufficient confusion for a regulated party to justifiably claim a deprivation of fair notice."); *United States v. S. Ind. Gas & Elec. Co. (SIGECO)*, 245 F. Supp. 2d 994, 1021 (S.D. Ind. 2003) ("Confusion within the enforcing agency as to the proper interpretation of a regulation is relevant evidence that suggests lack of fair notice.").

MGPI lacked fair notice that its construction of new whiskey aging warehouses was a "major modification" requiring a permit for at least two reasons. First, even though EPA Region V alleges in its Notice and Finding of Violation that emissions from whiskey aging operations are not fugitive, EPA headquarters and other regional offices have consistently taken the exact opposite view for decades, making the instant enforcement action an abrupt shift in policy. Second, MGPI lacked notice that fugitive emissions would be considered in the major modification determination because of the uncertainty surrounding the legal status of EPA's fugitive emissions rules and the Indiana SIP.

II. Even If Whiskey Aging Emissions Are Properly Considered Not Fugitive, EPA Failed to Provide Requisite Notice of That Regulatory Status.

Fugitive emissions are those which "could not *reasonably* pass through a stack, chimney, vent, or other functionally equivalent opening." *See* 40 C.F.R. §§ 51.301, 52.21(b)(20) (emphasis added); *see also* 45 Fed. Reg. 52,676, 52,692-93 (Aug. 7, 1980) (fugitive emissions are those which would not "ordinarily be collected and discharged through stacks or other functionally equivalent openings").

EPA headquarters, other EPA regions, and state permitting officials exercising their authority under the Clean Air Act have long concluded, and repeatedly informed the regulated community, that emissions from whiskey aging operations cannot be reasonably collected

because the collection process would ruin the whiskey being aged. MGPI maintains that this conclusion is correct, and such emissions are indeed fugitive.

Perhaps most significantly, a search of EPA's RACT/BACT/LAER Clearinghouse shows that there are no control methods listed for alcohol aging operations. EPA has described the clearinghouse as being able to "help permit applicants and reviewers make pollution prevention and control technology decisions for stationary air pollution sources." EPA, Permit Data Base.[3] EPA is required by statute to maintain the Clearinghouse to "make information regarding emission control technology available to the States and to the general public." 42 U.S.C. § 7408(h). Permitting authorities are required to provide LAER information to EPA for inclusion in the Clearinghouse. 42 U.S.C. § 7503(d). Given that LAER information must be on the Clearinghouse, and EPA is statutorily required to maintain it as a repository of data relating to permitting , it is quite significant that no such controls are listed in the Clearinghouse.

The absence of any RACT/BACT/LEAR Clearinghouse controls for alcohol aging operations is also consistent with permitting decisions relating to whiskey aging facilities. For example, in 2012 Kentucky permitted a Louisville whiskey warehouse, characterizing the emissions as fugitive in nature. Louisville Metro Air Pollution Control Dist., Title V Statement of Basis, at 11 (2012).[4] *See also* San Joaquin Valley Unified Air Pollution Control Dist., Appendix K: Reasonable Available Control Technology Analysis (RACT) for Wine Fermentation, Wine Storage Tanks, and Brandy Aging at 12-13 (Apr. 30, 2007) (District could not "find *any facility in the nation* that are (sic) mandated to control" emissions from whiskey aging (emphasis added)).[5] Likewise, the Indiana Office of Environmental Adjudication has concluded that whiskey aging emissions are fugitive in nature. *See In Re: Objection to the Issuance of Part 70 General Operating Permit No. T-137-6928-000111 for Joseph E. Seagram & Sons, Inc.*, 2004 OEA 58 (03-A-J-3003), at 64 (Ind. Office of Envtl. Adjud., Aug. 4, 2004).[6]

EPA has long agreed with this view in various sources beyond the Clearinghouse. In an October 23, 2000 letter to the Chair of the Senate Committee on Environment & Public Works, the Deputy Assistant Administrator for Air and Radiation said plainly that EPA has not identified "*any* . . . technology which it considers to be [reasonably available control technology] for alcohol beverage aging warehouses" in part because of concerns that such technology would "adversely affect the product quality." Letter from John C. Beale, Deputy Assistant

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[3] https://www.epa.gov/catc/ractbactlaer-clearinghouse-rblc-basic-information.

[4] *Available at* https://louisvilleky.gov/sites/default/files/air_pollution_control_district/documents/permits/titlev/20120601basis136_97_tv_r1_plant244.pdf

[5] *Available at* https://www.valleyair.org/Air_Quality_Plans/docs/AQ_Ozone_2007_Adopted/28%20Appendix%20K%20April%202007.pdf.

[6] *Available at*: http://www.in.gov/oea/decisions/2004oea58.pdf

Administrator for Air and Radiation, U.S. EPA, to the Hon. Robert C. Smith, Chairman, Senate Comm. on Env't & Pub. Works (Oct. 23, 2000) (the "2000 Letter") (emphasis added) (attached).

This letter reflects EPA's longstanding position, and the position it states has been repeatedly reiterated, and never retracted, by the Agency.

As long ago as 1978, EPA concluded that "control of emissions from whiskey warehousing has not been demonstrated at this time." EPA, Emission Standards and Engr'g Div., Chemical and Petroleum Branch, Office of Air Quality Planning and Standards, Cost and Engineering Study - Control of Volatile Organic Emissions From Whiskey Warehousing at 1-4 (Apr. 1978).

In 1987, EPA rejected "proposed control technologies" for storing nonindustrial distilled beverage alcohol because they "could contaminate beverage alcohol, resulting in a product with little or no market value." Standards of Performance for New Stationary Sources: Volatile Organic Liquids Storage Vessels, Final Rule, 52 Fed. Reg. 11,420, 11,434 (Apr. 8, 1987).

In 1994, Region 4 explained that "EPA does not consider windows and screen panels [in whiskey aging warehouses] to fall within" the definition of "functionally equivalent opening" for purposes of fugitive emissions analysis. Letter From Jewell A. Harper, Chief Air Enforcement Branch, Region IV, to John W. Walton, Director of the Div. of Air Pollution Control, Tenn. Dep't of the Envmt. (August 19, 1994).

In 1997, EPA's AP-42 emission factors remarked that "Add-on air pollution control devices for whisky aging warehouses are not used because of the anticipated adverse impact that such systems would have on product quality". EPA Office of Air Quality Planning & Standards, Emission Factor Documentation for AP-42, Section 9.12.3 at 2-12 Standards of Performance for New Stationary Sources (Mar. 1997).[7] EPA is required by statute to update these emission factors once every three years, 42 U.S.C. § 7430, but EPA has not since 1997 updated these factors, demonstrating that this remains the Agency's view.

We also note that a 2015 decision from the 6th Circuit described a permit for a whiskey warehouse in Louisville, Kentucky, noting that "[t]he permit does not cap fugitive ethanol emissions, i.e., those from Diageo's storage warehouses." *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 688 (6th Cir. 2015).

MGPI was entitled to, and did, rely in good faith on this consistently articulated policy, as did its sophisticated environmental consultants. *See, e.g., Beaver Plant Operations, Inc. v. Herman*, 223 F.3d 25, 31 (1st Cir. 2000) (considering testimony of "experts regarding industry practice"); *Martin v. Am. Cyanamid Co.*, 5 F.3d 140, 146 (6th Cir. 1993) (fair notice determination "is made with reference to what an employer familiar with the industry could reasonably be expected to know"); *SEC v. Kovzan*, No. 11-2017, 2012 WL 4819011, at *5 (D. Kan.

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[7] *Available at* https://www3.epa.gov/ttnchie1/ap42/ch09/bgdocs/b9s12-3.pdf

Oct. 10, 2012) ("industry practice may be considered in ruling on fair notice defense"). Region V cannot, consistent with due process, hold MGPI liable for failing to anticipate that Region V would take a position contrary to the rest of the agency.[8]

As the D.C. Circuit has held, "it is unlikely" that an agency has provided "adequate notice when different divisions of the enforcing agency disagree." *GE*, 53 F.3d at 1332 (holding that EPA failed to give fair notice in part because at least one, and possibly two, regional offices had guidance agreeing with the regulated entity's position); *Rollins Envtl. Servs. Inc. v. EPA*, 937 F.2d 649, 653 (D.C. Cir. 1991) (concluding that a penalty could not be imposed in light of the fact that EPA had written a report acknowledging "significant disagreement among various headquarters and regional offices" as to whether conduct that served as predicate to violation was actually illegal).

Region V's NFV is especially impermissible given EPA's regional consistency guidelines that are designed to "[a]ssure fair and uniform application" of the Clean Air Act, 40 C.F.R. § 56.3, evidencing "EPA's firm commitment to national uniformity in the application of its permitting rules," *Nat'l Envtl. Dev. Assoc.'s Clean Air Project v. EPA*, 752 F.3d 999, 1010 (D.C. Cir. 2014). This inconsistent position is particularly problematic under EPA's regional consistency guidelines *See* 40 C.F.R. § 56.5(a) (regional officials must assure that "actions taken under the [Clean Air Act]" are "as consistent as reasonably possible with the activities of other Regional Offices").

III. EPA Has Not Provided Fair Notice That Fugitive Emissions Are Counted in Major Modification Determinations

EPA has also failed to provide fair notice that MGPI's fugitive emissions—VOC emissions from its new aging warehouses—would be considered in the major modification determination. The stay purporting to allow EPA to consider these emissions was invalidly promulgated, and also inconsistent with Indiana's State Implementation Plan (SIP).

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[8] The existence of a 1996 letter in which Region V concluded that VOC emissions from whiskey aging operations were not fugitive does not somehow cure the fair notice problem. *See* Letter from Cheryl Newton, Chief, Permits and Grants Section, Region V, to Paul Dubenetzsky, Permit Branch, Office of Air Mgmt., Indiana Dep't of Envtl. Mgmt. (Apr. 16, 1996). Region V's letter was issued four years *before* the 2000 Letter's authoritative statement that no workable control technology exists, *before* the 1997 AP-42 factors, and *before* the statements by state regulators cited above.

Notably, this letter has been criticized as lacking any supporting analysis. *See In Re: Objection to the Issuance of Part 70 General Operating Permit No. T-137-6928-000111 for Joseph E. Seagram & Sons, Inc.*, 2004 OEA 58 (03-A-J-3003), at 64 (Ind. Office of Envtl. Adjud., Aug. 4, 2004) (specifically criticizing the letter as being devoid of "supporting evidence" and reaching the opposite conclusion). Moreover, Region V's letter itself acknowledged recognizing "a letter from another USEPA region that appears to be inconsistent with [its] position." *See* Letter from Cheryl Newton, *supra*

On December 19, 2008, EPA promulgated the "Fugitive Emissions Rule." 73 Fed. Reg. 77,882 (Dec. 19, 2008). The Rule clarified that fugitive emissions should generally not be considered when determining whether a physical or operational change at an existing source results in a "major modification" under the CAA's New Source Review provisions. *See id.* Under the Rule, fugitive emissions from whiskey aging operations would not be taken into consideration when determining whether a major modification of a source has occurred.[9]

On April 24, 2009, EPA granted a petition to "reconsider" the Fugitive Emissions Rule, and administratively stayed that rule pursuant to the CAA, which authorizes EPA to stay rules pending reconsideration "for a period not to exceed three months." 42 U.S.C. § 7607(d)(7)(B).[10] EPA later extended the stay three times, long beyond three months:

- In December 2009, EPA extended the stay for an additional 3 months. EPA did not take public comment on the extension. 74 Fed. Reg. 65,692 (Dec. 11, 2009).

- In March 2010, EPA extended the stay for another 18 months. EPA provided notice and took comment on whether to extend the stay before issuing the extension. 75 Fed. Reg. 16,012 (Mar. 31, 2010).

- In March 2011, EPA extended the stay indefinitely "until EPA completes its reconsideration of the Fugitive Emissions Rule." 76 Fed. Reg. 17,548, 17,548 (Mar. 30, 2011). EPA did not take public comment, but instead issued the extension pursuant to the "good cause" exemption. *See* 5 U.S.C. § 553(b). Though EPA did take comment after the rule was promulgated, it did not respond to them.

Though EPA stated that it anticipated it would propose and finalize a replacement rule by October 4, 2012, *see* 76 Fed. Reg. at 17,551, it never even proposed a new rule.

EPA's decision to indefinitely stay the Fugitive Emissions Rule is void *ab initio* for two separate reasons.

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[9] The Rule did not apply to–and therefore, fugitive emissions are still counted in major modification determinations for–sources in industries that have been designated through rulemaking under § 302(j) of the CAA. *See* 73 Fed. Reg. at 77,882; *see also* 42 U.S.C. § 7602(j). Whiskey aging operations are not among these industries. *See* 40 C.F.R. §§ 70.2, 71.2 (listing 26 industries as well as "[a]ny other stationary source category which . . . is being regulated under section 111 or 112 of the Act"); *id.* Parts 60, 63 (source categories regulated under sections 111 (new source performance standards) and 112 (air toxics) of the Clean Air Act).

[10] EPA initially announced the stay on April 24, 2009. Letter from Lisa Jackson (Apr. 24, 2009), *available at* https://www.regulations.gov/document?D=EPA-HQ-OAR-2004-0014-0062. EPA subsequently realized that it could not institute a stay without publishing notice in the Federal Register, which occurred on September 30, 2009. 74 Fed. Reg. 50,115, 50,115 (Sept. 30, 2009).

First, EPA lacks authority to stay Clean Air Act rules pending reconsideration for longer than 90 days. 42 U.S.C. § 7607(d)(7)(B) grants EPA authority to issue a three-month stay pending administrative reconsideration, expressly provides that other than that three-month stay period, "[s]uch reconsideration shall not postpone the effectiveness of the rule." The D.C. Circuit has interpreted this language to mean that "the EPA had no authority to stay the effectiveness of a promulgated standard except for the single, three-month period authorized by section 307(d)(7)(B) of the CAA." *NRDC v. Reilly*, 976 F.2d 36, 41 (D.C. Cir. 1992). Accordingly, EPA could not and did not validly stay the 2008 rule for more than three months.

Second, EPA violated the Administrative Procedure Act (APA), 5 U.S.C., § 551 *et seq.*, because it failed to take notice and comment on the indefinite stay. Courts have consistently held that suspensions—particularly indefinite suspensions—of validly-promulgated rules are themselves rulemakings that must go through the APA notice and comment process. *See, e.g.*, *NRDC v. Abraham*, 355 F.3d 179, 204-06 (2d Cir. 2004) (60-day delay of an effective date imposed by an incoming administration was a substantive rule that must comply with the APA); *accord Envtl. Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802 (D.C. Cir. 1983) (indefinite suspension of a rule must go through APA notice and comment procedures); *Ranchers Cattlemen Action Legal Fund v. Dep't of Agriculture*, 566 F. Supp. 2d 995, 1004-05 (D.S.D. 2008) (rejecting the argument "that a temporary postponement of an effective date is not a rulemaking").[11]

Because it did not go through the proper procedures, the indefinite stay of the Rule is void and the parties should be "place[d] . . . in the positions they would have been if the APA had not been violated"—i.e., "EPA's postponement" of the 2008 rule is invalid and should not be given effect. *NRDC v. EPA*, 683 F.2d 752, 768 (3d Cir. 1982).

Even if EPA could prevail on the argument that the indefinite stay is valid, the uncertainty surrounding the legal status of the Fugitive Emissions Rule means that MGPI lacked notice that emissions from the whiskey warehouses would be counted towards a major modification determination. EPA stayed the Rule by invoking § 307(d)(7)(B) of the CAA, which permits only a 90-day stay, a deadline which has long since passed. It then "indefinitely" stayed the Rule pending reconsideration, but never took any action towards actually revising it. At best for EPA, the status of fugitive emissions was in limbo. At worst, the stay plainly expired by operation of law.

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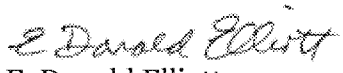
[11] "[T]he provision of post-promulgation notice and comment procedures cannot cure the failure" to promulgate the stay validly in the first place. *NRDC v. EPA*, 683 F.2d 752, 768 (3d Cir. 1982). *See also Abraham*, 355 F.3d at 206 n.14 (agreeing with *NRDC*); *N.J. Dep't of Envtl. Protection v. EPA*, 626 F.2d 1038, 1049 (D.C. Cir. 1980) ("The Administrator now argues that his provision for post hoc comment 'cures' his failure to follow section 553's procedures. We cannot agree."). Nor can EPA rely on the good cause exemption, as it took notice and comment on the second of the three stays of the Fugitive Emissions Rule, and did not point to any new circumstances to justify disregarding the requirement to take public comment for the third stay extension.

Further adding to the uncertainty, Indiana's SIP, which EPA must approve, is inconsistent with the notion that the stay of the Fugitive Emissions Rule is in effect. Subject to exceptions not relevant here, fugitive emissions are not counted for major modification determinations under the SIP. *See* 326 Ind. Admin. Code § 2-3-2(g). EPA never issued a SIP call to revise the SIP to conform to its indefinite stay. MGPI cannot be faulted for complying with the plain terms of the Indiana SIP.

* * *

I hope this letter helps you understand the merits of our legal position. Tony and I look forward to discussing it with you and moving forward to resolve this case.

Sincerely,



E. Donald Elliott
Senior of Counsel

Of Counsel

Tony Sullivan
Barnes & Thornburg LLP
11 S. Meridian St.
Indianapolis, IN 46204
Ex. 6
Tony.Sullivan@btlaw.com

Attachment

Message

From: Elliott, Don [DElliott@cov.com]
Sent: 5/31/2017 3:57:26 PM
To: Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]
Subject: RE: Good Example of Regional Overreach and Defying HQ Policy

Will do. Thanks for the feedback.

From: Schwab, Justin [mailto:schwab.justin@epa.gov]
Sent: Wednesday, May 31, 2017 11:53 AM
To: Elliott, Don
Subject: Re: Good Example of Regional Overreach and Defying HQ Policy

Don,

Thank you for this. I would be happy to facilitate and participate in a meeting to discuss this. Please do make an official request and inform me when you have done so, so I can follow up appropriately.

Best,
Justin

Sent from my iPhone

On May 31, 2017, at 11:48 AM, Elliott, Don <DElliott@cov.com> wrote:

> Justin,
>
> Attached is an example of a regional attorney trying to change 17 years of agency and state policy (IDEM) via a notice of violation. As far as we can tell, this has not been coordinated with OAQPS, much less announced to the regulated community. Region V is the worst offender in my experience, particularly when there is no political appointee supervising. Hope we can discuss this general problem at our lunch on June 9. I recently spoke to the Large Public Power Council (LPPC) and they said that Administrator Pruitt had spoken to them the day before and suggested setting up individual coordinators for each state, which might help.
>
> As for the particular matter itself, I might like to set up a meeting to come in and discuss with you and Lori Schmidt, as well as possibly Susan Bodine at OECA. I see a few general policy issues that I would think would concern OGC: fair notice, regional consistency and the status of the Obama Administration's purported "indefinite stay" of a Bush era rule under a statutory provision that is specifically limited to 90 days and does not postpone the rule's effectiveness. All discussed in the attached letter.
>
> Let me know if you'd be receptive to setting up such a meeting and I'll make an official request.
>
> Don

E. Donald Elliott

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<image001.png>

<Elliott Letter to Tennenbaum.5 25 17..pdf>

<2000 OAR Letter.pdf>

Message

From: Elliott, Don [DElliott@cov.com]
Sent: 5/31/2017 3:46:47 PM
To: Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]
Subject: Good Example of Regional Overreach and Defying HQ Policy
Attachments: Elliott Letter to Tennenbaum.5 25 17..pdf; 2000 OAR Letter.pdf

Justin,

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Let me know if you'd be receptive to setting up such a meeting and I'll make an official request.

Don

E. Donald Elliott

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COVINGTON

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT 23 2000

OFFICE OF
AIR AND RADIATION

The Honorable Robert C. Smith
Chairman, Committee on Environment
& Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter is in response to your question as to whether the Environmental Protection Agency (EPA) has identified reasonably available control technology (RACT) for ethanol emissions from alcohol beverage aging warehouses. One control technology which has been suggested in this regard is carbon adsorption which conceivably could be applied to the warehouse ventilation exhaust to capture ethanol fumes. However, in order to capture the warehouse fumes it may be necessary to modify the air flowing through the warehouse which could affect temperature, humidity and ventilation in the warehouse. The industry has raised questions about whether these changes would adversely affect the product quality.

Due to this unresolved issue, EPA has not, at this time, declared that such add-on control devices are RACT for alcohol beverage aging warehouses. Nor has EPA currently identified any other available technology which it considers to be RACT for alcohol beverage aging warehouses. Therefore, EPA is not requiring states to control these sources in order to meet ozone control state implementation plan requirements.

I appreciate this opportunity to be of service and trust that this information will be helpful to you.

Sincerely,

John C. Beale
Deputy Assistant Administrator
for Air and Radiation

cc: The Honorable Max Baucus

EXHIBIT
Witness
10

COVINGTON

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By Electronic and U.S. Mail

May 26, 2017

Susan M. Tennenbaum
Associate Regional Counsel
U.S. EPA - Region 5
77 West Jackson Blvd., C-14J
Chicago, IL 60604

Re: MGPI of Indiana, LLC Notice and Finding of Violation

Dear Susan:

As you know, I was recently brought on board by MGP Ingredients (MGP) to explore the possibility of finding a mutually acceptable settlement to your December 21, 2016 Notice and Finding of Violation issued to MGPI of Indiana, LLC (MGPI). My co-counsel Tony Sullivan and I were surprised and very disappointed with your May 12 email, which we interpreted as meaning that EPA Region V did not want to meet with us unless we agreed in advance to propose a program of controls on whiskey aging warehouses.

In what follows, we explain why Region V cannot via notice of violation unilaterally change EPA's long-stated policy that the so-called "angels' share" that leaks out of the barrels during whiskey aging are fugitive emissions that are not subject to control.

The Fair Notice Doctrine Precludes Enforcement Prior to an Announcement by EPA Headquarters of a Change in Position. Under the fair notice doctrine, which is described in more detail below, any federal agency, including EPA, has an obligation to tell the regulated community the "rules of the game" in advance of bringing an enforcement proceeding for allegedly violating them. As outlined below, as of the date of the purported "violation," *all* of EPA's notices and statements of position to the regulated community, including the RACT/BACT/LAER clearinghouse, continued the Agency's long-standing policy as stated in the 2000 Letter from the Deputy Assistant Administrator for Air and Radiation (copy attached) that the "angels' share" that leaks out of wooden barrels naturally during whiskey aging are fugitive emissions that are not subject to control without unacceptable effects on product quality.

There has been no announcement to the regulated community of any change in this long-standing position by EPA Headquarters, nor has there been an opportunity for notice and comment on the recent efforts by Gallo to control emissions from a brandy aging warehouse in California. In fact, even the San Joaquin Valley Air Pollution Control District, which promulgated the rule governing the Gallo facility, expressly acknowledged that it "understands that the nature of whiskey aging operations differs from wine and brandy aging. Specifically, the ambient conditions, such as storage temperature and humidity, as well as seasonal variations, are important factors in the whiskey aging process. All aging processes[] depend[] upon the interaction of product in oak barrels, whiskey aging operations strive for a particular blend of temperature, humidity, and ventilation, leading to different types of warehouse. Therefore,

whiskey aging is not considered or included in this rule development process." Final Draft Staff Report at 3 (Sept. 17, 2009) (citing EPA's AP-42 factors).[1]

At a minimum, before changing its position, EPA would have an obligation to determine, and to make available for public comment and criticism, whether there has been an adverse effect on product quality in the Gallo experiment or whether the results, even if successful, can be projected to the quite different process of traditional natural aging of Bourbon whiskey, which we are advised is very different than brandy. Indeed, EPA recognizes the difference between brandy and whiskey warehouses, as it has an AP-42 emission factor for brandy and wine aging separate from the factor used for whiskey aging. *Compare* EPA Office of Air Quality Planning & Standards, Emission Factor Documentation for AP-42, Section 9.12.2 Standards of Performance for New Stationary Sources (Oct. 1995) (standards for wine and brandy) *with*, Section 9.12.3 Standards of Performance for New Stationary Sources (Mar. 1997) (standards for other distilled spirits). We do understand that certain Region V staff apparently disagree with all the Agency's prior conclusions, and also with those of their colleagues in other regions, but bringing an enforcement case based on isolated opinions alone, rather than what the Agency has officially told the regulated community consistently in the past is simply impermissible. As the late Justice Scalia put it for an unanimous Supreme Court,

> "It is hard to imagine a more violent breach of [the requirement of reasoned decision-making] than applying a rule of primary conduct ... which is in fact different than the rule or standard formally announced."[2]

We are bringing this to your attention first in the hopes that you will be persuaded to drop the Notice and Finding of Violation (NFV) and advise your colleagues to work through normal channels of consultation—including with the regulated community—to try to change the agency's position if you believe a policy change is appropriate. It is also noteworthy that at the time of the alleged violations, the area was actually in compliance with the NAAQS for ozone, as EPA later acknowledged by re-designating it as attainment. 82 Fed. Reg. 16,940 (Apr. 7, 2017). That fact alone would justify an exercise of prosecutorial discretion not to bring a case seeking to impose LAER. However, if you are determined to proceed with the NFV even though EPA Headquarters has not notified the regulated community that it is reconsidering or changing its long-standing position, we will of course be forced to elevate the issue with the political leadership of the agency, including OAR, OAQPS, OECA, OGC, the Department of Justice, and if necessary, in court.

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[1] *Available at* https://www.valleyair.org/Board_meetings/gb/agenda_minutes/Agenda/2009/September/Agenda_Item_9_Sep_17_2009.pdf

[2] *Allentown Mack Sales and Service Inc. v. NLRB*, 522 U.S. 359, 374 (1998).

I. The Fair Notice Doctrine

"It is a cardinal rule of administrative law" that a regulated entity must be given fair notice of "what conduct is prohibited or required of it." *Wisconsin Res. Prot. Council v. Flambeau Min. Co.*, 727 F.3d 700, 707 (7th Cir. 2013) (quotation marks omitted). "In the absence of notice . . . an agency may not deprive a party of property by imposing civil or criminal liability." *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995).

An agency has "has fairly notified a petitioner" if "by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, *with ascertainable certainty*, the standards with which the agency expects parties to conform." *Flambeau*, 727 F.3d at 708 (quotation marks omitted) (emphasis added). Importantly, an agency's position can be entirely permissible, but nevertheless fall afoul of the fair notice requirement if the agency has not provided adequate notice. *Gen. Elec.*, 53 F.3d at 1325 ("We conclude that EPA's interpretation of those regulations is permissible, but because the regulations did not provide GE with fair warning of the agency's interpretation, we vacate the finding of liability and set aside the fine."). The consistency of an agency's public proclamations on an issue is crucial to providing notice of what is required. *See United States v. Lachman*, 387 F.3d 42, 57 (1st Cir. 2004) ("When the agency itself issues contradictory or misleading public interpretations of a regulation, there may be sufficient confusion for a regulated party to justifiably claim a deprivation of fair notice."); *United States v. S. Ind. Gas & Elec. Co. (SIGECO)*, 245 F. Supp. 2d 994, 1021 (S.D. Ind. 2003) ("Confusion within the enforcing agency as to the proper interpretation of a regulation is relevant evidence that suggests lack of fair notice.").

MGPI lacked fair notice that its construction of new whiskey aging warehouses was a "major modification" requiring a permit for at least two reasons. First, even though EPA Region V alleges in its Notice and Finding of Violation that emissions from whiskey aging operations are not fugitive, EPA headquarters and other regional offices have consistently taken the exact opposite view for decades, making the instant enforcement action an abrupt shift in policy. Second, MGPI lacked notice that fugitive emissions would be considered in the major modification determination because of the uncertainty surrounding the legal status of EPA's fugitive emissions rules and the Indiana SIP.

II. Even If Whiskey Aging Emissions Are Properly Considered Not Fugitive, EPA Failed to Provide Requisite Notice of That Regulatory Status.

Fugitive emissions are those which "could not *reasonably* pass through a stack, chimney, vent, or other functionally equivalent opening." *See* 40 C.F.R. §§ 51.301, 52.21(b)(20) (emphasis added); *see also* 45 Fed. Reg. 52,676, 52,692-93 (Aug. 7, 1980) (fugitive emissions are those which would not "ordinarily be collected and discharged through stacks or other functionally equivalent openings").

EPA headquarters, other EPA regions, and state permitting officials exercising their authority under the Clean Air Act have long concluded, and repeatedly informed the regulated community, that emissions from whiskey aging operations cannot be reasonably collected

because the collection process would ruin the whiskey being aged. MGPI maintains that this conclusion is correct, and such emissions are indeed fugitive.

Perhaps most significantly, a search of EPA's RACT/BACT/LAER Clearinghouse shows that there are no control methods listed for alcohol aging operations. EPA has described the clearinghouse as being able to "help permit applicants and reviewers make pollution prevention and control technology decisions for stationary air pollution sources." EPA, Permit Data Base.[3] EPA is required by statute to maintain the Clearinghouse to "make information regarding emission control technology available to the States and to the general public." 42 U.S.C. § 7408(h). Permitting authorities are required to provide LAER information to EPA for inclusion in the Clearinghouse. 42 U.S.C. § 7503(d). Given that LAER information must be on the Clearinghouse, and EPA is statutorily required to maintain it as a repository of data relating to permitting , it is quite significant that no such controls are listed in the Clearinghouse.

The absence of any RACT/BACT/LEAR Clearinghouse controls for alcohol aging operations is also consistent with permitting decisions relating to whiskey aging facilities. For example, in 2012 Kentucky permitted a Louisville whiskey warehouse, characterizing the emissions as fugitive in nature. Louisville Metro Air Pollution Control Dist., Title V Statement of Basis, at 11 (2012).[4] *See also* San Joaquin Valley Unified Air Pollution Control Dist., Appendix K: Reasonable Available Control Technology Analysis (RACT) for Wine Fermentation, Wine Storage Tanks, and Brandy Aging at 12-13 (Apr. 30, 2007) (District could not "find *any facility in the nation* that are (sic) mandated to control" emissions from whiskey aging (emphasis added)).[5] Likewise, the Indiana Office of Environmental Adjudication has concluded that whiskey aging emissions are fugitive in nature. *See In Re: Objection to the Issuance of Part 70 General Operating Permit No. T-137-6928-000111 for Joseph E. Seagram & Sons, Inc.*, 2004 OEA 58 (03-A-J-3003), at 64 (Ind. Office of Envtl. Adjud., Aug. 4, 2004).[6]

EPA has long agreed with this view in various sources beyond the Clearinghouse. In an October 23, 2000 letter to the Chair of the Senate Committee on Environment & Public Works, the Deputy Assistant Administrator for Air and Radiation said plainly that EPA has not identified "*any* . . . technology which it considers to be [reasonably available control technology] for alcohol beverage aging warehouses" in part because of concerns that such technology would "adversely affect the product quality." Letter from John C. Beale, Deputy Assistant

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[3] https://www.epa.gov/catc/ractbactlaer-clearinghouse-rblc-basic-information.

[4] *Available at* https://louisvilleky.gov/sites/default/files/air_pollution_control_district/documents/permits/titlev/20120601basis136_97_tv_r1_plant244.pdf

[5] *Available at* https://www.valleyair.org/Air_Quality_Plans/docs/AQ_Ozone_2007_Adopted/28%20Appendix%20K%20April%202007.pdf.

[6] *Available at*: http://www.in.gov/oea/decisions/2004oea58.pdf

Administrator for Air and Radiation, U.S. EPA, to the Hon. Robert C. Smith, Chairman, Senate Comm. on Env't & Pub. Works (Oct. 23, 2000) (the "2000 Letter") (emphasis added) (attached).

This letter reflects EPA's longstanding position, and the position it states has been repeatedly reiterated, and never retracted, by the Agency.

As long ago as 1978, EPA concluded that "control of emissions from whiskey warehousing has not been demonstrated at this time." EPA, Emission Standards and Engr'g Div., Chemical and Petroleum Branch, Office of Air Quality Planning and Standards, Cost and Engineering Study - Control of Volatile Organic Emissions From Whiskey Warehousing at 1-4 (Apr. 1978).

In 1987, EPA rejected "proposed control technologies" for storing nonindustrial distilled beverage alcohol because they "could contaminate beverage alcohol, resulting in a product with little or no market value." Standards of Performance for New Stationary Sources: Volatile Organic Liquids Storage Vessels, Final Rule, 52 Fed. Reg. 11,420, 11,434 (Apr. 8, 1987).

In 1994, Region 4 explained that "EPA does not consider windows and screen panels [in whiskey aging warehouses] to fall within" the definition of "functionally equivalent opening" for purposes of fugitive emissions analysis. Letter From Jewell A. Harper, Chief Air Enforcement Branch, Region IV, to John W. Walton, Director of the Div. of Air Pollution Control, Tenn. Dep't of the Envmt. (August 19, 1994).

In 1997, EPA's AP-42 emission factors remarked that "Add-on air pollution control devices for whisky aging warehouses are not used because of the anticipated adverse impact that such systems would have on product quality". EPA Office of Air Quality Planning & Standards, Emission Factor Documentation for AP-42, Section 9.12.3 at 2-12 Standards of Performance for New Stationary Sources (Mar. 1997).[7] EPA is required by statute to update these emission factors once every three years, 42 U.S.C. § 7430, but EPA has not since 1997 updated these factors, demonstrating that this remains the Agency's view.

We also note that a 2015 decision from the 6th Circuit described a permit for a whiskey warehouse in Louisville, Kentucky, noting that "[t]he permit does not cap fugitive ethanol emissions, i.e., those from Diageo's storage warehouses." *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 688 (6th Cir. 2015).

MGPI was entitled to, and did, rely in good faith on this consistently articulated policy, as did its sophisticated environmental consultants. *See, e.g., Beaver Plant Operations, Inc. v. Herman*, 223 F.3d 25, 31 (1st Cir. 2000) (considering testimony of "experts regarding industry practice"); *Martin v. Am. Cyanamid Co.*, 5 F.3d 140, 146 (6th Cir. 1993) (fair notice determination "is made with reference to what an employer familiar with the industry could reasonably be expected to know"); *SEC v. Kovzan*, No. 11-2017, 2012 WL 4819011, at *5 (D. Kan.

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[7] *Available at* https://www3.epa.gov/ttnchie1/ap42/ch09/bgdocs/b9s12-3.pdf

Oct. 10, 2012) ("industry practice may be considered in ruling on fair notice defense"). Region V cannot, consistent with due process, hold MGPI liable for failing to anticipate that Region V would take a position contrary to the rest of the agency.[8]

As the D.C. Circuit has held, "it is unlikely" that an agency has provided "adequate notice when different divisions of the enforcing agency disagree." *GE*, 53 F.3d at 1332 (holding that EPA failed to give fair notice in part because at least one, and possibly two, regional offices had guidance agreeing with the regulated entity's position); *Rollins Envtl. Servs. Inc. v. EPA*, 937 F.2d 649, 653 (D.C. Cir. 1991) (concluding that a penalty could not be imposed in light of the fact that EPA had written a report acknowledging "significant disagreement among various headquarters and regional offices" as to whether conduct that served as predicate to violation was actually illegal).

Region V's NFV is especially impermissible given EPA's regional consistency guidelines that are designed to "[a]ssure fair and uniform application" of the Clean Air Act, 40 C.F.R. § 56.3, evidencing "EPA's firm commitment to national uniformity in the application of its permitting rules," *Nat'l Envtl. Dev. Assoc.'s Clean Air Project v. EPA*, 752 F.3d 999, 1010 (D.C. Cir. 2014). This inconsistent position is particularly problematic under EPA's regional consistency guidelines *See* 40 C.F.R. § 56.5(a) (regional officials must assure that "actions taken under the [Clean Air Act]" are "as consistent as reasonably possible with the activities of other Regional Offices").

III. EPA Has Not Provided Fair Notice That Fugitive Emissions Are Counted in Major Modification Determinations

EPA has also failed to provide fair notice that MGPI's fugitive emissions—VOC emissions from its new aging warehouses—would be considered in the major modification determination. The stay purporting to allow EPA to consider these emissions was invalidly promulgated, and also inconsistent with Indiana's State Implementation Plan (SIP).

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[8] The existence of a 1996 letter in which Region V concluded that VOC emissions from whiskey aging operations were not fugitive does not somehow cure the fair notice problem. *See* Letter from Cheryl Newton, Chief, Permits and Grants Section, Region V, to Paul Dubenetzsky, Permit Branch, Office of Air Mgmt., Indiana Dep't of Envtl. Mgmt. (Apr. 16, 1996). Region V's letter was issued four years *before* the 2000 Letter's authoritative statement that no workable control technology exists, *before* the 1997 AP-42 factors, and *before* the statements by state regulators cited above.

Notably, this letter has been criticized as lacking any supporting analysis. *See In Re: Objection to the Issuance of Part 70 General Operating Permit No. T-137-6928-000111 for Joseph E. Seagram & Sons, Inc.*, 2004 OEA 58 (03-A-J-3003), at 64 (Ind. Office of Envtl. Adjud., Aug. 4, 2004) (specifically criticizing the letter as being devoid of "supporting evidence" and reaching the opposite conclusion). Moreover, Region V's letter itself acknowledged recognizing "a letter from another USEPA region that appears to be inconsistent with [its] position." *See* Letter from Cheryl Newton, *supra*

On December 19, 2008, EPA promulgated the "Fugitive Emissions Rule." 73 Fed. Reg. 77,882 (Dec. 19, 2008). The Rule clarified that fugitive emissions should generally not be considered when determining whether a physical or operational change at an existing source results in a "major modification" under the CAA's New Source Review provisions. *See id.* Under the Rule, fugitive emissions from whiskey aging operations would not be taken into consideration when determining whether a major modification of a source has occurred.[9]

On April 24, 2009, EPA granted a petition to "reconsider" the Fugitive Emissions Rule, and administratively stayed that rule pursuant to the CAA, which authorizes EPA to stay rules pending reconsideration "for a period not to exceed three months." 42 U.S.C. § 7607(d)(7)(B).[10] EPA later extended the stay three times, long beyond three months:

- In December 2009, EPA extended the stay for an additional 3 months. EPA did not take public comment on the extension. 74 Fed. Reg. 65,692 (Dec. 11, 2009).

- In March 2010, EPA extended the stay for another 18 months. EPA provided notice and took comment on whether to extend the stay before issuing the extension. 75 Fed. Reg. 16,012 (Mar. 31, 2010).

- In March 2011, EPA extended the stay indefinitely "until EPA completes its reconsideration of the Fugitive Emissions Rule." 76 Fed. Reg. 17,548, 17,548 (Mar. 30, 2011). EPA did not take public comment, but instead issued the extension pursuant to the "good cause" exemption. *See* 5 U.S.C. § 553(b). Though EPA did take comment after the rule was promulgated, it did not respond to them.

Though EPA stated that it anticipated it would propose and finalize a replacement rule by October 4, 2012, *see* 76 Fed. Reg. at 17,551, it never even proposed a new rule.

EPA's decision to indefinitely stay the Fugitive Emissions Rule is void *ab initio* for two separate reasons.

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[9] The Rule did not apply to–and therefore, fugitive emissions are still counted in major modification determinations for–sources in industries that have been designated through rulemaking under § 302(j) of the CAA. *See* 73 Fed. Reg. at 77,882; *see also* 42 U.S.C. § 7602(j). Whiskey aging operations are not among these industries. *See* 40 C.F.R. §§ 70.2, 71.2 (listing 26 industries as well as "[a]ny other stationary source category which . . . is being regulated under section 111 or 112 of the Act"); *id.* Parts 60, 63 (source categories regulated under sections 111 (new source performance standards) and 112 (air toxics) of the Clean Air Act).

[10] EPA initially announced the stay on April 24, 2009. Letter from Lisa Jackson (Apr. 24, 2009), *available at* https://www.regulations.gov/document?D=EPA-HQ-OAR-2004-0014-0062. EPA subsequently realized that it could not institute a stay without publishing notice in the Federal Register, which occurred on September 30, 2009. 74 Fed. Reg. 50,115, 50,115 (Sept. 30, 2009).

First, EPA lacks authority to stay Clean Air Act rules pending reconsideration for longer than 90 days. 42 U.S.C. § 7607(d)(7)(B) grants EPA authority to issue a three-month stay pending administrative reconsideration, expressly provides that other than that three-month stay period, "[s]uch reconsideration shall not postpone the effectiveness of the rule." The D.C. Circuit has interpreted this language to mean that "the EPA had no authority to stay the effectiveness of a promulgated standard except for the single, three-month period authorized by section 307(d)(7)(B) of the CAA." *NRDC v. Reilly*, 976 F.2d 36, 41 (D.C. Cir. 1992). Accordingly, EPA could not and did not validly stay the 2008 rule for more than three months.

Second, EPA violated the Administrative Procedure Act (APA), 5 U.S.C., § 551 *et seq.*, because it failed to take notice and comment on the indefinite stay. Courts have consistently held that suspensions—particularly indefinite suspensions—of validly-promulgated rules are themselves rulemakings that must go through the APA notice and comment process. *See, e.g.*, *NRDC v. Abraham*, 355 F.3d 179, 204-06 (2d Cir. 2004) (60-day delay of an effective date imposed by an incoming administration was a substantive rule that must comply with the APA); *accord Envtl. Def. Fund, Inc. v. Gorsuch*, 713 F.2d 802 (D.C. Cir. 1983) (indefinite suspension of a rule must go through APA notice and comment procedures); *Ranchers Cattlemen Action Legal Fund v. Dep't of Agriculture*, 566 F. Supp. 2d 995, 1004-05 (D.S.D. 2008) (rejecting the argument "that a temporary postponement of an effective date is not a rulemaking").[11]

Because it did not go through the proper procedures, the indefinite stay of the Rule is void and the parties should be "place[d] . . . in the positions they would have been if the APA had not been violated"—i.e., "EPA's postponement" of the 2008 rule is invalid and should not be given effect. *NRDC v. EPA*, 683 F.2d 752, 768 (3d Cir. 1982).

Even if EPA could prevail on the argument that the indefinite stay is valid, the uncertainty surrounding the legal status of the Fugitive Emissions Rule means that MGPI lacked notice that emissions from the whiskey warehouses would be counted towards a major modification determination. EPA stayed the Rule by invoking § 307(d)(7)(B) of the CAA, which permits only a 90-day stay, a deadline which has long since passed. It then "indefinitely" stayed the Rule pending reconsideration, but never took any action towards actually revising it. At best for EPA, the status of fugitive emissions was in limbo. At worst, the stay plainly expired by operation of law.

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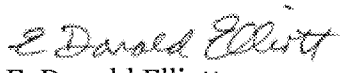
[11] "[T]he provision of post-promulgation notice and comment procedures cannot cure the failure" to promulgate the stay validly in the first place. *NRDC v. EPA*, 683 F.2d 752, 768 (3d Cir. 1982). *See also Abraham*, 355 F.3d at 206 n.14 (agreeing with *NRDC*); *N.J. Dep't of Envtl. Protection v. EPA*, 626 F.2d 1038, 1049 (D.C. Cir. 1980) ("The Administrator now argues that his provision for post hoc comment 'cures' his failure to follow section 553's procedures. We cannot agree."). Nor can EPA rely on the good cause exemption, as it took notice and comment on the second of the three stays of the Fugitive Emissions Rule, and did not point to any new circumstances to justify disregarding the requirement to take public comment for the third stay extension.

Further adding to the uncertainty, Indiana's SIP, which EPA must approve, is inconsistent with the notion that the stay of the Fugitive Emissions Rule is in effect. Subject to exceptions not relevant here, fugitive emissions are not counted for major modification determinations under the SIP. *See* 326 Ind. Admin. Code § 2-3-2(g). EPA never issued a SIP call to revise the SIP to conform to its indefinite stay. MGPI cannot be faulted for complying with the plain terms of the Indiana SIP.

* * *

I hope this letter helps you understand the merits of our legal position. Tony and I look forward to discussing it with you and moving forward to resolve this case.

Sincerely,



E. Donald Elliott
Senior of Counsel

Of Counsel

Tony Sullivan
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Tony.Sullivan@btlaw.com

Attachment

Message

From: Whitfield, Peter C. [peter.whitfield@hoganlovells.com]
Sent: 6/21/2017 3:06:13 PM
To: Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]
Subject: RE: Tribes and CERCLA

You bet. Let me know if you want to grab lunch sometime. Maybe we can invite your other fellow deputies – would enjoy a chance to meet them.
~Peter

Peter Whitfield
Senior Associate

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www.hoganlovells.com

From: Schwab, Justin [mailto:schwab.justin@epa.gov]
Sent: Wednesday, June 21, 2017 9:12 AM
To: Whitfield, Peter C.
Subject: Re: Tribes and CERCLA

Thanks!

Sent from my iPhone

On Jun 21, 2017, at 8:56 AM, Whitfield, Peter C. <peter.whitfield@hoganlovells.com> wrote:

> Justin,
> Good to see you this morning. Attached is the case I had mentioned – it was cited recently by another court as well.
>
> **Peter Whitfield**
> Senior Associate
>
> **Hogan Lovells US LLP**
> Columbia Square
> 555 Thirteenth Street, NW
> Washington, DC 20004

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Please consider the environment before printing this e-mail.

<dct-order-dismissing-teck-camino-counterclaims.pdf>

<Quinault Indian Nation v Comenout.pdf>

Message

From: Whitfield, Peter C. [peter.whitfield@hoganlovells.com]
Sent: 6/21/2017 12:54:49 PM
To: Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]
Subject: Tribes and CERCLA
Attachments: dct-order-dismissing-teck-camino-counterclaims.pdf; Quinault Indian Nation v Comenout.pdf

Flag: Flag for follow up

Justin,
Good to see you this morning. Attached is the case I had mentioned – it was cited recently by another court as well.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOSEPH A. PAKOOTAS, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; and DONALD L. MICHEL, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; and the CONFEDERATED TRIBES OF THE COLVILLE RESERVATION,

Plaintiffs,

And

STATE OF WASHINGTON,

Plaintiff-Intervenor,

v.

TECK COMINCO METALS, LTD., a Canadian corporation,

Defendant.

No. CV-04-256-LRS

ORDER GRANTING PLAINTIFF'S 12(b)(6) MOTION TO DISMISS, *INTER ALIA*

BEFORE THE COURT are the Plaintiff's Fed. R. Civ. P. 12(b)(6) Motion To Dismiss Defendant's Counterclaims (Ct. Rec. 262), and Plaintiff's Request For Judicial Notice In Support Of Its 12(b)(6) Motion (Ct. Rec. 265).

Oral argument was heard on June 4, 2009. Paul J. Dayton, Esq., argued

on behalf of Plaintiff Confederated Tribes Of The Colville Reservation ("Tribes"). Mark E. Elliott argued on behalf of Defendant Teck Cominco Metals, Ltd. ("Teck").

I. BACKGROUND

In its Answer to the Second Amended Complaint of the Tribes (Ct. Rec 194), Defendant Teck asserts two CERCLA[1] counterclaims against the Tribes, contending the Tribes caused and contributed to the hazardous substances contamination of Lake Roosevelt. As part of its counterclaims against the Tribes for cost recovery, contribution and declaratory relief, Teck alleges the Tribes "are covered 'persons' within the meaning of that term as it is used in CERCLA, 42 U.S.C. Section 9601(21)." The Tribes move to dismiss the counterclaims, asserting they are not "person[s]" subject to liability under CERCLA, 42 U.S.C. Section 9607(a), and therefore, that Teck's counterclaims are not based on "a cognizable legal theory."

II. DISCUSSION

A. 12(b)(6) Standard/Judicial Notice

A Rule 12(b)(6) dismissal is proper only where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). In reviewing a 12(b)(6) motion, the court must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from such allegations. *Mendocino Environmental Center v. Mendocino*

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[1] Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. Section 9601 *et. seq.*

County, 14 F.3d 457, 460 (9th Cir. 1994); *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). The sole issue raised by a 12(b)(6) motion is whether the facts pleaded, if established, would support a claim for relief; therefore, no matter how improbable those facts alleged are, they must be accepted as true for purposes of the motion. *Neitzke v. Williams*, 490 U.S. 319, 326-27, 109 S.Ct. 1827 (1989).

Unless the court converts the Rule 12(b)(6) motion into a summary judgment motion, or the defense is apparent from matters of which the court may take judicial notice, the court cannot consider material outside the complaint (e.g. facts presented in briefs, affidavits or discovery materials). *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001). A matter that is properly the subject of judicial notice (Fed. R. Evid. 201) may be considered along with the complaint when deciding a 12(b)(6) motion to dismiss without converting the motion to one for summary judgment. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986). The court may properly consider matters of public record (e.g. pleadings, orders and other papers on file in another action pending in the court; records and reports of administrative bodies; or the legislative history of laws, rules or ordinances) as long as the facts noticed are not subject to reasonable dispute. *Intri-Plex Technologies, Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007).

B. Statutory Language

42 U.S.C. Section 9607 imposes liability upon certain "persons" (i.e, owner/operator, arranger, transporter) for costs incurred in responding to a release of hazardous substances. "Person" is defined in Section 9601(21) as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission,

political subdivision of a State, or any interstate body." "Indian tribe" is not expressly included in this list and indeed, is defined separately at Section 9601(36).

"[W]hen the statute's language is plain, the sole function of the courts- at least where the disposition required by the text is not absurd- is to enforce it according to its terms." *Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S.Ct. 1942 (2000). In *Hartford*, the U.S. Supreme Court reiterated what it had previously said in *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146 (1992):

> [I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. [Citations omitted]. When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete." [Citation omitted].

CERCLA's definition of "person" is plain. It does not include "Indian tribes." Finding that CERCLA liability cannot be imposed on Indian tribes per the terms of the statute is not an "absurd" result. Whereas CERCLA specifically provides for liability **to** an Indian tribe, 42 U.S.C. Section 9607(a)(4)(A) and 9607(f), it contains no specific provision for the liability **of** an Indian tribe.[2] Furthermore, sovereigns will not be read into the term "person" unless there is affirmative evidence that Congress intended to include

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[2] Under the canon of statutory construction *expressio unius est exclusio alterius*, the express mentioning of one thing implies exclusion of another. Thus, to the extent it is necessary to rely on any additional canons of statutory construction beyond "plain meaning," *expressio unius est exclusio alterius* supports the conclusion that Indian tribes are not "persons" subject to CERCLA liability.

sovereigns. *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667, 99 S.Ct. 2529 (1979); *Fayed v. CIA*, 229 F.3d 272, 274 (D.C. Cir. 2000). Congress can waive a tribe's immunity from suit, but that waiver must be clearly expressed. Congress has plenary power over tribal sovereignty, but must make clear its intent to limit that sovereignty. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670 (1978); *Fletcher v. United States*, 116 F.3d 1315, 1328 (10th Cir. 1997).[3]

Defendant Teck, as it must, acknowledges CERCLA is silent on the issue of whether tribes are covered as "persons." Defendant acknowledges there is no legislative history regarding whether Congress intended Indian tribes to be subject to liability under CERCLA. Nevertheless, Defendant asserts this is of no consequence since it is clear what CERCLA is intended to address, that being holding parties responsible for cleaning up hazardous substances contamination caused by them. Defendant, a foreign (Canadian) corporation, which the Ninth Circuit in *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1079 (9th Cir. 2006) found was subject to CERCLA liability despite the fact that its disposal activity occurred in Canada, says there is no reason why an

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[3] Absent clear Congressional intent and an analysis of such intent, it matters not that courts may have somehow inadvertently "implied" that Indian tribes are "persons" subject to CERCLA liability. Defendant's reliance on *United States v. Atlantic Research Corp.*, 551 U.S. 128, 127 S.Ct. 2331, 2336 (2007), and *United States v. Friedland*, 152 F.Supp.2d 1234, 1247 (D. Colo. 2001), is not persuasive. Those cases did not specifically deal with the question of whether Indian tribes are subject to liability under CERCLA.

Indian tribe should be treated any differently.[4] This, however, ignores the fact that "corporations" are specifically among the enumerated entities included within the definition of "person" in 42 U.S.C. Section 9601(21), whereas Indian tribes are not, and do not fall neatly into the definition of any of the other enumerated entities. Furthermore, a foreign corporation is not generally entitled to sovereign immunity, unlike an Indian tribe which has been recognized by the United States Government. An Indian tribe simply is not just any other party for the purpose of ascertaining whether liability is authorized by CERCLA.

Defendant Teck argues that CERCLA's use of the term "municipality" should be read *in pari materia* with other federal environmental statutes, including the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901 *et seq*., the Safe Drinking Water Act (SDWA), 42 U.S.C. §§ 300f *et. seq.*, and the Clean Water Act (CWA), 33 U.S.C. §§ 1251 *et seq.* Each of those other environmental statute defines "person" to include "municipalities," and in turn, defines "municipalities" to specifically include "Indian tribes." 42 U.S.C. § 6903(13)(A); 42 U.S.C. § 300(f)(10); and 33 U.S.C. § 1362(4). In other words, the argument is that even though CERCLA does not define the term "municipality," the fact CERCLA defines "person" to include municipalities should lead the court to conclude that CERCLA's definition of "person" includes Indian tribes.

The *in pari materia* canon of statutory construction is only employed

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[4] Although the "disposal activity" occurred in Canada, "releases" of hazardous substances as a result of that "disposal activity" occurred in the United States (specifically in Lake Roosevelt). Accordingly, in *Pakootas*, the Ninth Circuit found Teck was subject to CERCLA and that CERCLA was not being applied "extraterritorially."

where a statute is ambiguous. For reasons set forth above, CERCLA is not ambiguous with respect to whether Indian tribes are covered "persons" subject to CERCLA liability. Moreover, application of *in pari materia* is problematic because: 1) waiver of tribal sovereign immunity requires an expression of clear intent on the part of Congress; and 2) even without regard to sovereign immunity, CERCLA is distinct from other environmental statutes- RCRA, the SDWA, and the CWA- and does not address precisely the same subject matter. In *Pakootas*, the Ninth Circuit pointed out the distinction between CERCLA and RCRA:

> CERCLA is only concerned with imposing liability for cleanup of hazardous waste disposal sites where there has been an actual or threatened release of hazardous substances into the environment. CERCLA does not obligate parties (either foreign or domestic) liable for cleanup costs to cease the **disposal activities** such as those that made them liable for cleanup costs; regulating **disposal activities** is in the domain of RCRA or other regulatory statutes.

452 F.3d at 1079 (emphasis added). RCRA regulates "disposal activities," whereas CERCLA concerns itself with liability for cleaning up hazardous substances which have already been "disposed" and which have now been released or are threatened to be released into the environment. See also *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 116 S.Ct. 1251, 1255 (1996) (RCRA allows landowner to seek relief for present "imminent and substantial" threats to health and/or environment; RCRA has an "immediate action" stance, where CERCLA has a more traditional tort liability stance).

Furthermore, CERCLA treats an Indian tribe differently from a municipality. For example, an Indian tribe is entitled to costs of a removal or remedial action "not inconsistent with the national contingency plan," 42 U.S.C. Section 9607(a)(4)(A), whereas "any other person" (i.e., a municipality) must prove that costs incurred are "consistent with the national contingency plan," 42

U.S.C. Section 9607(a)(4)(B). The latter contains a more rigorous evidentiary burden. The costs associated with response action undertaken by an Indian tribe can be avoided by the defendants only if the defendants can show they are not consistent with the national contingency plan (NCP), whereas response action costs incurred by "any other person" require that "other person" to show his action is consistent with the NCP before he will be allowed to recover his costs. *Town of Bedford v. Raytheon, Co.*, 755 F.Supp. 469, 472 (D. Mass. 1991).

Finally, Defendant Teck contends an Indian tribe qualifies as either an "association" or as a "consortium" under the definition of "person" in 42 U.S.C. Section 9601(21). As with the term "municipality," the terms "association" and "consortium" are not specifically defined in CERCLA. CERCLA has existed for nearly 30 years, and RCRA, with it definition of "municipalities" including "Indian tribes," has existed in excess of 30 years. In that time, Congress has had more than an adequate opportunity to address any oversight regarding liability of Indian tribes under CERCLA. If Congress intended to make Indian tribes liable under CERCLA, one has to ask why it did not specifically include "Indian tribes" among the entities covered by the term "person" in Section 9601(21), nor specifically define "municipality," "association," or "consortium" to include "Indian tribes." It seems extremely implausible that Congress would simply leave it to chance that some court would conclude an Indian tribe qualifies as one of those entities subject to CERCLA liability.

There may be some very compelling policy reasons why Indian tribes should not be exempt from CERCLA liability, but that is something Congress needs to address, not this court. Defendant asserts that "[u]nder the Tribes' interpretation of CERCLA, an Indian tribe could never, under any circumstances, be found to be a responsible party under CERCLA," and "[a]s a result, an Indian tribe could literally operate a dump for the disposal of

hazardous substances, with complete impunity under CERCLA." However, such a conclusion is of dubious validity inasmuch as a tribe's disposal activities would clearly be subject to regulation under RCRA as well as SDWA and the CWA.

There is authority that when an Indian tribe files suit, it waives it immunity as to counterclaims of a defendant that sound in recoupment. *Berrey v. ASARCO Incoporated*, 439 F.3d 636, 643-45 (10th Cir. 2006); *Rosebud Sioux Tribe v. Val-U Constr. Co.*, 50 F.3d 560, 562 (8th Cir. 1995); and *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982). Claims in recoupment arise out of the same transaction or occurrence, seek the same kind of relief as the plaintiff, and do not seek an amount in excess of that sought by the plaintiff. *Berrey*, 439 F.3d at 643. Sovereign immunity is waived because "recoupment is in the nature of a defense arising out of some feature of the transaction upon which the [sovereign's] action is grounded." *Id.*, quoting *Bull v. United States*, 295 U.S. 247, 262, 55 S.Ct. 695 (1935). Waiver under the doctrine of recoupment does not depend on prior waiver by the sovereign or an independent congressional abrogation of immunity. *Id.* at 644. In *Berrey*, the Tenth Circuit held the defendants' counterclaims for **common law** contribution and indemnity against the Quapaw Tribe were not waived because those counterclaims sounded in recoupment. The Tribe also argued for dismissal of defendants' CERCLA counterclaims for contribution, contending the counterclaims were not permitted because CERCLA's definition of "person" does not include Indian tribes. The Tenth Circuit held it did not have jurisdiction over the issue and declined to address the argument. *Id.* at 646.

In *Berrey*, the Quapaw Tribe sought dismissal of CERCLA counterclaims based on statutory interpretation, not tribal sovereign immunity. So too here, the Confederated Tribes Of The Colville Reservation seek dismissal of

Defendant's CERCLA counterclaims based on statutory interpretation, not sovereign immunity. As is apparent, however, the court's interpretation of CERCLA is necessarily colored by sovereign immunity principles.

C. EPA Interpretation and Indian Canons of Construction

Because the plain language of CERCLA reveals that Indian tribes are not subject to liability under that statute, there is no reason for the court to consider how EPA has interpreted CERCLA as it pertains to tribal liability. CERCLA is not silent or ambiguous on this issue and accordingly, there is no reason for the court to consider and give deference to EPA's interpretation. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778 (1984). Congressional intent to exclude Indian tribes from liability is clear from the language of the statute, a conclusion that is reinforced by the fact there is no affirmative evidence that Congress intended to include sovereigns in the definition of "person."

For the same reasons, the court need not consider application of Indian law canons of construction in determining whether there is tribal liability under CERCLA.

III. CONCLUSION

The Colville Confederated Tribes' Fed. R. Civ. P. 12(b)(6) Motion To Dismiss Defendant's Counterclaims (Ct. Rec. 262) is **GRANTED**. Defendant's CERCLA counterclaims against the Tribes are **DISMISSED with prejudice** as they are not premised on a cognizable legal theory. The legal deficiency of these counterclaims cannot be cured by an amended complaint or by any other means. The Tribes' Request For Judicial Notice In Support Of Its 12(b)(6) Motion (Ct. Rec. 265) is **DISMISSED as moot** since it is unnecessary to

consider EPA's interpretation of CERCLA in arriving at a resolution of the issue presented to the court.

IT IS SO ORDERED. The District Court Executive is directed to enter this order and forward copies to counsel of record.

DATED this 19th day of June, 2009.

s/Lonny R. Suko

LONNY R. SUKO
United States District Judge

2015 WL 1311438
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington, at Tacoma.

QUINAULT INDIAN NATION, Plaintiff,
v.
Edward A. COMENOUT, et al., Defendants.

No. C10–5345 BHS.
|
Signed March 23, 2015.

Attorneys and Law Firms

Raymond G. Dodge, Jr., Naomi Leigh Stacy, Tribal Attorney, Taholah, WA, Rob Roy Smith, Kilpatrick Townsend & Stockton LLP, Seattle, WA, for Plaintiff.

Robert E. Kovacevich, Aaron Lee Lowe, Spokane, WA, Randal Bruce Brown, Randal Brown Law Office, Covington, WA, for Defendants.

ORDER GRANTING PLAINTIFF'S MOTIONS TO DISMISS AND DENYING AS MOOT DEFENDANT ESTATE OF EDWARD COMENOUT'S MOTION TO AMEND

BENJAMIN H. SETTLE, District Judge.

***1** This matter comes before the Court on Plaintiff Quinault Indian Nation's ("Nation") motion to voluntarily dismiss its complaint and motion to dismiss counterclaims (Dkt.59) and Defendant Estate of Edward Comenout's ("Estate") motion to amend its counterclaims (Dkt.63). The Court has considered the pleadings filed in support of and in opposition to the motions and the remainder of the file and hereby grants the Nation's motions and denies the Estate's motion as moot for the reasons stated herein.

I. PROCEDURAL AND FACTUAL BACKGROUND

This lawsuit is one of many ongoing disputes involving Edward Comenout, the Indian Country Store, and the payment (or lack thereof) of cigarette taxes. *See, e.g., Comenout v. Washington,* 722 F.2d 574 (9th Cir.1983); *Matheson v. Kinnear,* 393 F.Supp. 1025 (W.D.Wash.1974); *State v. Comenout,* 173 Wash.2d 235, 267 P.3d 355 (2011).

Edward Comenout was an enrolled member of the Nation, a federally recognized Indian tribe. Dkt. 1, Complaint ("Comp.") ¶¶ 1.1, 2.1. In 1971, Edward Comenout began operating the Indian Country Store. *Id.* ¶¶ 2.1, 2.3, 267 P.3d 355. The store is located in Puyallup, Washington on land held in trust by the United States. *Id.* ¶ 2.1, 267 P.3d 355. The store sells cigarettes and tobacco products to both tribal and non-tribal members. *Id.* ¶ 2.3, 267 P.3d 355.

In 2005, the Nation and the State of Washington ("State") entered into a cigarette tax compact. *Id.* ¶ 1.7, 267 P.3d 355. Pursuant to the compact, the Nation retains one hundred percent of the state excise taxes assessed on cigarettes. *Id.* ¶ 1.8, 267 P.3d 355. In 2006, the Nation enacted a Cigarette Sales and Tax Code, which implemented the compact and assessed a cigarette tax on both tribal and non-tribal members. *Id.* ¶ 1.11, 267 P.3d 355.

On May 14, 2010, the Nation brought suit against various defendants, including Edward Comenout (collectively "Defendants"). Comp. The Nation alleges that Defendants violated the Racketeering Influence and Corrupt Organizations Act ("RICO") by defrauding the Nation of cigarette taxes. *Id.* ¶¶ 5.1–8.6, 267 P.3d 355. The Nation seeks a total of ninety million dollars in unpaid tax revenue. *Id.* The Nation also asserts a breach of contract claim against Edward Comenout, and seeks thirty million dollars in damages. *Id.* ¶ 9 .1–9.6, 267 P.3d 355.

On June 4, 2010, Edward Comenout passed away. Dkt. 20 at 2. On December 8, 2010, the Estate was substituted as a defendant. Dkt. 27.

On December 30, 2010, the Estate asserted counterclaims against the Nation. Dkt. 28. The Estate alleges that the Nation wrongfully denied Edward Comenout of "a right to have an interest" in land that he leased from a fellow tribal member. *Id.* at 11–12, 267 P.3d 355. The Estate seeks a declaratory judgment, a writ of mandamus, and lost

profits. *Id.* at 13, 267 P.3d 355. The Estate also alleges that the Nation "agreed with the State of Washington to fix the wholesale and retail price of cigarettes to customers in the relevant market area [and] therefore has participated in an illegal conspiratorial enterprise with the State." *Id.* at 15, 267 P.3d 355. The Estate seeks treble damages for lost income. *Id.* at 16, 267 P.3d 355.

***2** On February 2, 2015, the Nation moved to dismiss its suit without prejudice. Dkt. 59. The Nation also moved to dismiss the Estate's counterclaims. *Id.* On February 11, 2015, the Estate responded. Dkt. 62. On February 27, 2015, the Nation replied. Dkt. 67.

On February 26, 2015, the Estate moved to amend its answer and counterclaim. Dkt. 63. On March 16, 2015, the Nation responded. Dkt. 70. The Estate did not file a reply.

II. DISCUSSION

A. Nation's Motions to Dismiss

The Nation moves to voluntarily dismiss its complaint without prejudice under Federal Rule of Civil Procedure 41(a)(2). Dkt. 59 at 6–8. The Estate objects to dismissal, arguing that its counterclaims are valid and should be decided. Dkt. 62 at 2, 23. The Nation contends that the Court should dismiss the Estate's counterclaims because they are barred by the Nation's sovereign immunity. Dkt. 59 at 4.

1. Rule 41(a)(2)

Under Rule 41(a)(2), "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." Fed.R.Civ.P. 41(a)(2). "If a defendant has pleaded a counterclaim before being served with plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication." *Id.* The decision to grant or deny a request pursuant to Rule 41(a)(2) is within the sound discretion of the district court and is reviewed only for abuse of discretion. *Sams v. Beech Aircraft Corp.*, 625 F.2d 273, 277 (9th Cir.1980). "A district court should grant a motion for voluntary dismissal under Rule 41(a)(2) unless a defendant can show that it will suffer some plain legal prejudice as a result." *Smith v. Lenches*, 263 F.3d 972, 975 (9th Cir.2001).

2. Estate's Counterclaims

In this case, the Estate asserted counterclaims before the Nation moved to voluntarily dismiss its complaint. *See* Dkts. 28, 59. Pursuant to Rule 41(a)(2), the Court may not dismiss this action over the Estate's objections unless the Estate's counterclaims can remain pending for independent adjudication. Fed.R.Civ.P. 41(a)(2).

The Nation argues that the Estate's counterclaims should be dismissed because the Nation has not waived its sovereign immunity as to the counterclaims. Dkt. 59 at 4. "Federally recognized Indian tribes enjoy sovereign immunity from suit." *Pit River Home & Agr. Co-op. Ass'n v. United States*, 30 F.3d 1088, 1100 (9th Cir.1994). "Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991). "[A] tribe's participation in litigation does not constitute consent to counterclaims asserted by the defendants in those actions." *McClendon v. United States*, 885 F.2d 627, 630 (9th Cir.1989). "Although a counterclaim may be asserted against a sovereign by way of set off or recoupment to defeat or diminish the sovereign's recovery, no affirmative relief may be given against a sovereign in the absent of consent." *United States v. Agnew*, 423 F.2d 513, 514 (9th Cir.1970).

***3** As a federally recognized Indian tribe, the Nation enjoys sovereign immunity to suit. This sovereign immunity extends to counterclaims. Thus, absent an express waiver of immunity by the Nation, the Court must dismiss any counterclaims brought by the Estate that are not claims in recoupment.

The Estate contends that the Nation waived its sovereign immunity by bringing this action in federal court. Dkt. 62 at 2. As discussed above, a tribe does not waive its immunity to counterclaims merely by initiating suit in federal court. *Okla. Tax Comm'n*, 498 U.S. at 509; *McClendon*, 885 F.2d at 630. Rather, the tribe must expressly waive its sovereign immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) ("It is settled that a waiver of [tribal] immunity cannot be implied but must be unequivocally expressed."). Here, there is no evidence that the Nation

has expressly waived its sovereign immunity to the Estate's counterclaims.

The Estate also argues that its counterclaims are claims for recoupment and thus not barred by the Nation's sovereign immunity. Dkt. 62 at 3. Counterclaims that sound in recoupment may be asserted against an Indian tribe. *Agnew,* 423 F.2d at 514; *see also Berrey v. Asarco Inc.,* 439 F.3d 636, 643–45 (10th Cir.2006); *Rosebud Sioux Tribe v. Val–U Constr. Co. of S. Dakota, Inc.,* 50 F.3d 560, 562 (8th Cir.1995). "Recoupment is a defensive action that operates to diminish the plaintiff's recovery rather than to assert affirmative relief." *Rosebud Sioux Tribe,* 50 F.3d at 562. "Claims in recoupment arise out of the same transaction or occurrence, seek the same kind of relief as the plaintiff, and do not seek an amount in excess of that sought by the plaintiff." *Pakootas v. Teck Cominco Metals, Ltd.,* 632 F.Supp.2d 1029, 1035 (E.D.Wash.2009) (citing *Berrey,* 439 F.3d at 643).

The Estate fails to establish that its counterclaims are claims for recoupment. First, the Estate's counterclaims do not arise out of the same transaction or occurrence as the Nation's claims. The Nation alleges that Edward Comenout failed to pay cigarette taxes in violation of RICO and breached a contract. Meanwhile, the Estate alleges that the Nation wrongfully denied Edward Comenout "a right to have an interest" in land and engaged in price fixing activities. Neither counterclaim arises from the same aggregate set of operative facts as the Nation's claims. *See In re Lazar,* 237 F.3d 967, 979 (9th Cir.2001). Additionally, the Estate's counterclaims seek to obtain affirmative relief rather than to diminish the Nation's recovery. For these reasons, the Estate's counterclaims are not claims for recoupment.

In sum, the Estate's counterclaims are barred by the Nation's sovereign immunity. The Nation has not expressly waived its sovereign immunity as to the Estate's counterclaims. The Estate's counterclaims also do not constitute claims in recoupment. Because the Court does not have jurisdiction over the Estate's counterclaims, the Court grants the Nation's motion to dismiss the Estate's counterclaims.

3. Nation's Suit

*4 Because no counterclaims remain pending, the Court may grant the Nation's motion to voluntarily dismiss this suit under Rule 41(a) (2). Defendants have not identified any legal prejudice that would result from dismissal. Accordingly, the Court grants the Nation's motion and dismisses this action without prejudice.

B. Estate's Motion to Amend

The Estate moves to amend its answer and counterclaims. Dkt. 64. The Estate seeks to plead more specific facts for tortious interference and price fixing, as well as add facts for an abuse of process claim. *Id.* at 2. Having granted the Nation's motion to voluntarily dismiss this suit, the Court denies the Estate's motion as moot. Even if the Estate's motion was not moot, the Estate's proposed amendments would be futile in light of the Nation's sovereign immunity.

III. ORDER

Therefore, it is hereby **ORDERED** that the Nation's motions to dismiss (Dkt.59) are **GRANTED.** The Estate's counterclaims are **DISMISSED** and this action is **DISMISSED without prejudice.** The Estate's motion to amend its counterclaim (Dkt.63) is **DENIED as moot.** The Clerk shall close this case.

All Citations

Not Reported in F.Supp.3d, 2015 WL 1311438

End of Document

Message

From: Savage, Justin A. [justin.savage@hoganlovells.com]
Sent: 5/4/2017 11:33:44 PM
To: Gunasekara, Mandy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=53d1a3caa8bb4ebab8a2d28ca59b6f45-Gunasekara,]
CC: Whitfield, Peter C. [peter.whitfield@hoganlovells.com]; Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]
Subject: RE: Holly Frontier - Possible to Reschedule from 5/11 @ 2 pm to 5/12 @ 2 pm?

Hey Mandy,

Sorry for the email barrage. We'll stick to the original date and time, so see ya'll @ May 11 @ 2 pm for the Holly Frontier RFS meeting.
Thx,
Justin

From: Savage, Justin A.
Sent: Tuesday, May 02, 2017 12:11 PM
To: 'Gunasekara, Mandy'
Cc: Whitfield, Peter C.; Schwab, Justin
Subject: Holly Frontier - Possible to Reschedule from 5/11 @ 2 pm to 5/12 @ 2 pm?

Mandy,
Per my VM, any way to reschedule from 5/11 @ 2 pm to 5/12 @ 2 pm for the Holly Frontier RFS meeting?
Thanks for your consideration,
Justin

From: Savage, Justin A.
Sent: Friday, April 28, 2017 7:52 PM
To: 'Gunasekara, Mandy'
Cc: Denise.McWatters@HollyFrontier.com; Whitfield, Peter C.; Schwab, Justin; Ward, Erin H.
Subject: RE: HollyFrontier follow-up meeting - May 1, 230 pm

Mandy,

Thanks for letting us know and agreeing to reschedule so quickly. We'll see ya'll May 11 at 2:00 pm.

Take care, and I hope you get to go home soon,

Justin

From: Gunasekara, Mandy [mailto:Gunasekara.Mandy@epa.gov]
Sent: Friday, April 28, 2017 7:35 PM
To: Savage, Justin A.
Cc: Denise.McWatters@HollyFrontier.com; Whitfield, Peter C.; Schwab, Justin; Ward, Erin H.
Subject: RE: HollyFrontier follow-up meeting - May 1, 230 pm

Hey Justin,

Sorry if I confirmed previously, but somehow it did not end up on my calendar. As such, I don't have the availability to meet on Monday.

From: Savage, Justin A. [mailto:justin.savage@hoganlovells.com]
Sent: Friday, April 28, 2017 9:48 AM
To: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>
Cc: Denise.McWatters@HollyFrontier.com; Whitfield, Peter C. <peter.whitfield@hoganlovells.com>; Schwab, Justin <schwab.justin@epa.gov>; Ward, Erin H. <erin.ward@hoganlovells.com>
Subject: RE: HollyFrontier follow-up meeting - May 1, 230 pm

Hi Mandy,

We're looking forward to our meeting on Monday at 230 pm. I understand from Peter that Justin will attend as well. For purposes of planning, these folks will attend the Monday meeting from our end:

- Denise McWatters, General Counsel, Holly Frontier;
- Justin Savage, Hogan Lovells;
- Peter Whitfield, Hogan Lovells; and
- Erin Ward, Hogan Lovells.

Have a good weekend,

Justin

Justin Savage
Partner

Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004

Tel: +1 202 637 5600
Direct:
Mobile **Ex. 6**
Fax: +1 202 637 5910
Email: justin.savage@hoganlovells.com
www.hoganlovells.com

From: Savage, Justin A.
Sent: Saturday, April 22, 2017 10:51 AM
To: Gunasekara Amanda "Mandy"
Cc: Denise.McWatters@HollyFrontier.com; Whitfield, Peter C.
Subject: HollyFrontier follow-up meeting - May 1, 230 pm

Hi Mandy,

We'd like to visit with you on May 1 at 230 pm. We look forward to the discussion.

Best,

Justin

Justin Savage
Partner

Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004

Tel:	+1 202 637 5600
Direct:	Ex. 6
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Please consider the environment before printing this e-mail.

Message

From: Haas, Alex (CIV) [Alex.Haas@usdoj.gov]
Sent: 5/4/2017 12:39:29 AM
To: Tenpas, Ronald J. [ronald.tenpas@morganlewis.com]; Wood, Jeffrey (ENRD) [Jeffrey.Wood@usdoj.gov]; Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]
Subject: Re: Time for a quick discussion?

Thanks Ron. Just to echo our eaier call, we our cautiously optimistic and we anticipate being able to be more definitive tomorrow.

We also appreciate your willingness to agree to the 7 day extension, which will greatly help working through the language with all The attention it deserves. The team will be in touch on that tomorrow and we'll circle back on this asap.

Sent from my Verizon, Samsung Galaxy smartphone

-------- Original message --------
From: "Tenpas, Ronald J." <ronald.tenpas@morganlewis.com>
Date: 5/3/17 8:29 PM (GMT-05:00)
To: "Wood, Jeffrey (ENRD)" <JWood@ENRD.USDOJ.GOV>, "Haas, Alex (CIV)" <alhaas@CIV.USDOJ.GOV>, Schwab.justin@Epa.gov
Subject: RE: Time for a quick discussion?

Understood. Thanks for the update. I didn't mean to suggest I was trying to pressure you -- I just wanted to be sure you all had the cell given it is a collective effort for your team and I wasn't sure who might want to reach me. Please don't hesitate to call tonight if that is helpful to you.

Ron

Ronald J. Tenpas
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW | Washington, DC 20004-2541
Ex. 6 Main: +1.202.739.3000 Ex. 6 Fax: +1.202.739.3001
ronald.tenpas@morganlewis.com | www.morganlewis.com
Assistant: Linda J. Ramsburg Ex. 6 linda.ramsburg@morganlewis.com

-----Original Message-----
From: Wood, Jeffrey (ENRD) [mailto:Jeffrey.Wood@usdoj.gov]
Sent: Wednesday, May 03, 2017 8:24 PM
To: Tenpas, Ronald J.; Haas, Alex (CIV); Schwab.justin@Epa.gov
Subject: RE: Time for a quick discussion?

We are working on it. Will be back in touch as soon as able...

-----Original Message-----
From: Tenpas, Ronald J. [mailto:ronald.tenpas@morganlewis.com]
Sent: Wednesday, May 03, 2017 8:22 PM
To: Haas, Alex (CIV) <alhaas@CIV.USDOJ.GOV>; Wood, Jeffrey (ENRD) <JWood@ENRD.USDOJ.GOV>; Schwab.justin@Epa.gov
Subject: RE: Time for a quick discussion?

Justin/Jeff/Alex,

I am heading out. If you end up wanting to talk tonight, you can reach me at: Ex. 6

Again, thanks for both of the quick calls today and for juggling your schedules.

Ron

Ronald J. Tenpas
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW | Washington, DC 20004-2541
Ex. 6 | Main: +1.202.739.3000 Ex. 6 Fax: +1.202.739.3001
ronald.tenpas@morganlewis.com | www.morganlewis.com
Assistant: Linda J. Ramsburg Ex. 6 linda.ramsburg@morganlewis.com

-----Original Message-----
From: Haas, Alex (CIV) [mailto:Alex.Haas@usdoj.gov]
Sent: Wednesday, May 03, 2017 6:29 PM
To: Wood, Jeffrey (ENRD); Tenpas, Ronald J.; Schwab.justin@Epa.gov
Subject: Re: Time for a quick discussion?

Sorry having trouble dealing with the calendar app.

Let's use this dial in: Ex. 6
Code: Ex. 6

Sent from my Verizon, Samsung Galaxy smartphone

-------- Original message --------
From: "Wood, Jeffrey (ENRD)" <JWood@ENRD.USDOJ.GOV>
Date: 5/3/17 6:23 PM (GMT-05:00)
To: "Haas, Alex (CIV)" <alhaas@CIV.USDOJ.GOV>, "Tenpas, Ronald J." <ronald.tenpas@morganlewis.com>, Schwab.justin@Epa.gov
Subject: RE: Time for a quick discussion?

Me too

From: Haas, Alex (CIV)
Sent: Wednesday, May 03, 2017 6:23 PM
To: Tenpas, Ronald J. <ronald.tenpas@morganlewis.com>; Wood, Jeffrey (ENRD) <JWood@ENRD.USDOJ.GOV>; Schwab.justin@Epa.gov
Subject: Re: Time for a quick discussion?

I can do a call. It might be most productive to have all of us on it.

Sent from my Verizon, Samsung Galaxy smartphone

-------- Original message --------
From: "Tenpas, Ronald J." <ronald.tenpas@morganlewis.com<mailto:ronald.tenpas@morganlewis.com>>
Date: 5/3/17 6:06 PM (GMT-05:00)
To: "Wood, Jeffrey (ENRD)" <JWood@ENRD.USDOJ.GOV<mailto:JWood@ENRD.USDOJ.GOV>>, Schwab.justin@Epa.gov<mailto:Schwab.justin@Epa.gov>
Cc: "Haas, Alex (CIV)" <alhaas@CIV.USDOJ.GOV<mailto:alhaas@CIV.USDOJ.GOV>>
Subject: Time for a quick discussion?

Jeff/Justin/Alex,

Would one (or all of you have time for a quick call)? I appreciated the candor on the call and I have had a chance to speak further with my client. I think I have some pretty concrete feedback at this point.

Ron

Ronald J. Tenpas
Morgan, Lewis & Bockius LLP
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Ex. 6 Main: +1.202.739.3000 Ex. 6 Fax: +1.202.739.3001
ronald.tenpas@morganlewis.com<mailto:ronald.tenpas@morganlewis.com> |
www.morganlewis.com<http://www.morganlewis.com/>
Assistant: Linda J. Ramsburg | Ex. 6 linda.ramsburg@morganlewis.com <mailto:linda.ramsburg@morganlewis.com>

Message

From: Tenpas, Ronald J. [ronald.tenpas@morganlewis.com]
Sent: 5/3/2017 10:29:13 PM
To: Haas, Alex (CIV) [Alex.Haas@usdoj.gov]; Wood, Jeffrey (ENRD) [Jeffrey.Wood@usdoj.gov]; Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]
Subject: RE: Time for a quick discussion?

Thanks to all of you. If you need a call in number we can use this, but if you have one you use that is fine also:

* Dial-in number (U.S. and Canada): Ex. 6
* Conference code: Ex. 6

Ronald J. Tenpas
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW | Washington, DC 20004-2541
Ex. 6 | Main: +1.202.739.3000 | Ex. 6 | Fax: +1.202.739.3001
ronald.tenpas@morganlewis.com | www.morganlewis.com
Assistant: Linda J. Ramsburg | Ex. 6 | linda.ramsburg@morganlewis.com

-----Original Message-----
From: Haas, Alex (CIV) [mailto:Alex.Haas@usdoj.gov]
Sent: Wednesday, May 03, 2017 6:24 PM
To: Wood, Jeffrey (ENRD); Tenpas, Ronald J.; Schwab.justin@Epa.gov
Subject: Re: Time for a quick discussion?

I will send a calendar invite for 630

Sent from my Verizon, Samsung Galaxy smartphone

-------- Original message --------
From: "Wood, Jeffrey (ENRD)" <JWood@ENRD.USDOJ.GOV>
Date: 5/3/17 6:23 PM (GMT-05:00)
To: "Haas, Alex (CIV)" <alhaas@CIV.USDOJ.GOV>, "Tenpas, Ronald J." <ronald.tenpas@morganlewis.com>, Schwab.justin@Epa.gov
Subject: RE: Time for a quick discussion?

Me too

From: Haas, Alex (CIV)
Sent: Wednesday, May 03, 2017 6:23 PM
To: Tenpas, Ronald J. <ronald.tenpas@morganlewis.com>; Wood, Jeffrey (ENRD) <JWood@ENRD.USDOJ.GOV>; Schwab.justin@Epa.gov
Subject: Re: Time for a quick discussion?

I can do a call. It might be most productive to have all of us on it.

Sent from my Verizon, Samsung Galaxy smartphone

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From: "Tenpas, Ronald J." <ronald.tenpas@morganlewis.com<mailto:ronald.tenpas@morganlewis.com>>
Date: 5/3/17 6:06 PM (GMT-05:00)
To: "Wood, Jeffrey (ENRD)" <JWood@ENRD.USDOJ.GOV<mailto:JWood@ENRD.USDOJ.GOV>>, Schwab.justin@Epa.gov<mailto:Schwab.justin@Epa.gov>
Cc: "Haas, Alex (CIV)" <alhaas@CIV.USDOJ.GOV<mailto:alhaas@CIV.USDOJ.GOV>>
Subject: Time for a quick discussion?

Jeff/Justin/Alex,

Would one (or all of you have time for a quick call)? I appreciated the candor on the call and I have had a chance to speak further with my client. I think I have some pretty concrete feedback at this point.

Ron

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Assistant: Linda J. Ramsburg | Ex. 6 linda.ramsburg@morganlewis.com
<mailto:linda.ramsburg@morganlewis.com>

Message

From: Gunasekara, Mandy [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=53D1A3CAA8BB4EBAB8A2D28CA59B6F45-GUNASEKARA,]
Sent: 5/10/2017 1:09:33 PM
To: Savage, Justin A. [justin.savage@hoganlovells.com]
CC: Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]; Whitfield, Peter C. [peter.whitfield@hoganlovells.com]
Subject: RE: Tomorrow's Meeting @ 2 pm -- HollyFrontier

Great – looking forward to it

From: Savage, Justin A. [mailto:justin.savage@hoganlovells.com]
Sent: Wednesday, May 10, 2017 8:32 AM
To: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>
Cc: Schwab, Justin <schwab.justin@epa.gov>; Whitfield, Peter C. <peter.whitfield@hoganlovells.com>
Subject: Tomorrow's Meeting @ 2 pm -- HollyFrontier

Hi Mandy and Justin,

We're looking forward to our meeting at 2:00 pm. We have some interesting information to share. Just for planning purposes, our side will include the following folks:

- Denise McWatters, General Counsel, Holly Frontier
- The Hogan Lovells team – Peter Whitfield, Erin Ward and me.

I'm tied up in meetings today with some other EPA folks, but Peter is around if there are any logistics issues to work through.

Best,
Justin

Justin Savage
Partner

Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004

Tel: +1 202 637 5600
Direct:
Mobile **Ex. 6**
Fax: +1 202 637 5910
Email: justin.savage@hoganlovells.com
www.hoganlovells.com

About Hogan Lovells
Hogan Lovells is an international legal practice that includes Hogan Lovells US LLP and Hogan Lovells International LLP. For more information, see www.hoganlovells.com.

Message

From: Whitfield, Peter C. [peter.whitfield@hoganlovells.com]
Sent: 3/29/2017 12:51:07 PM
To: Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]
Subject: Re: Trump EO

Thanks

Sent from my iPhone

On Mar 28, 2017, at 4:10 PM, Schwab, Justin <schwab.justin@epa.gov> wrote:

> I don't think I have a copy of the EO as signed today. If the White House doesn't have it, surely Inside EPA or E&E will have it soon….
>
> **From:** Whitfield, Peter C. [mailto:peter.whitfield@hoganlovells.com]
> **Sent:** Tuesday, March 28, 2017 4:08 PM
> **To:** Schwab, Justin <schwab.justin@epa.gov>
> **Subject:** Trump EO
>
> Justin,
> Any chance you have a copy of the executive order released today regarding climate change policy/CPP? I'm seeing news on it, but no actual EO.
> Thanks,
> Peter

Peter Whitfield
Senior Associate

Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004

Tel: +1 202 637 5600
Direct: Ex. 6
Fax: +1 202 637 5910
Email: peter.whitfield@hoganlovells.com
www.hoganlovells.com

Message

From: Whitfield, Peter C. [peter.whitfield@hoganlovells.com]
Sent: 4/10/2017 8:23:29 PM
To: Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]
Subject: RE: Meeting with EPA

Wednesday at 4pm.

Peter Whitfield
Senior Associate

Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004

Tel: +1 202 637 5600
Direct: Ex. 6
Fax: +1 202 637 5910
Email: peter.whitfield@hoganlovells.com
www.hoganlovells.com

From: Schwab, Justin [mailto:schwab.justin@epa.gov]
Sent: Monday, April 10, 2017 4:23 PM
To: Whitfield, Peter C.
Subject: Re: Meeting with EPA

Yes but not at the moment. When is your meeting?

Sent from my iPhone

On Apr 10, 2017, at 4:20 PM, Whitfield, Peter C. <peter.whitfield@hoganlovells.com> wrote:

> Hey Justin,
> Hope all is well. We have a meeting on Wednesday with Mandy and others at EPA. I wanted to reach out and touch base on a few details – any chance you have time for a quick call?
>
> **Peter Whitfield**
> Senior Associate
>
> **Hogan Lovells US LLP**
> Columbia Square
> 555 Thirteenth Street, NW
> Washington, DC 20004
>
> Tel: +1 202 637 5600
> Direct: Ex. 6

Fax: +1 202 637 5910
Email: peter.whitfield@hoganlovells.com
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Please consider the environment before printing this e-mail.

About Hogan Lovells
Hogan Lovells is an international legal practice that includes Hogan Lovells US LLP and Hogan Lovells International LLP. For more information, see www.hoganlovells.com.

Message

From: Whitfield, Peter C. [peter.whitfield@hoganlovells.com]
Sent: 3/24/2017 4:09:38 PM
To: Gunasekara, Mandy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=53d1a3caa8bb4ebab8a2d28ca59b6f45-Gunasekara,]; Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]
CC: Savage, Justin A. [justin.savage@hoganlovells.com]
Subject: 2007 CD - Lima Refinery
Attachments: Premcor CD - signed.pdf

Mandy and Justin,
Thanks for reaching out to us. Attached is the 2007 CD. Please let us know if you need anything else.

Peter Whitfield
Senior Associate

Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004

Tel: +1 202 637 5600
Direct: Ex. 6
Fax: +1 202 637 5910
Email: peter.whitfield@hoganlovells.com
www.hoganlovells.com

Please consider the environment before printing this e-mail.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA,
and
THE STATE OF OHIO
Plaintiffs,
and
the Memphis Shelby County Health Department,
Plaintiff-Intervener,
v.
The Premcor Refining Group Inc., and The Lima Refining Company,
Defendants.

CIVIL ACTION NO.

SA07CA0683 RF

CONSENT DECREE ADDENDUM

WHEREAS, Plaintiff, the United States of America ("Plaintiff" or "the United States"), on behalf of the United States Environmental Protection Agency ("EPA"), has simultaneously filed a Complaint against and lodged this Consent Decree Addendum ("Addendum") with The Premcor Refining Group Inc. and the Lima Refining Company (collectively, "Premcor") for alleged environmental violations at petroleum refineries owned and operated by Premcor;

WHEREAS, the United States has initiated a nationwide, broad-based compliance and enforcement initiative involving the petroleum refining industry (the "United States' Refinery Initiative");

WHEREAS, Valero Energy Corporation acquired Premcor Inc. and its subsidiaries via the September 1, 2005, merger of Premcor Inc. with and into Valero Energy Corporation, with Valero

Energy Corporation being the surviving corporation of the merger, and with Valero Energy Corporation becoming the ultimate parent of Premcor;

WHEREAS, on November 23, 2005, this Court entered at Docket No. SA-05-CA-0569-RF a separate Consent Decree ("Consent Decree") between the United States, certain plaintiff-interveners, and certain corporate subsidiaries of Valero Energy Corporation (collectively "Valero"), pursuant to the United States' Refinery Initiative, governing petroleum refineries owned by Valero and not subject to this Addendum;

WHEREAS, the United States' Complaint alleges that Premcor has been and is in violation of certain provisions of the Clean Air Act, 42 U.S.C. §7401 et seq., its implementing regulations, the relevant provisions of applicable State Implementation Plans ("SIPs"), and federally-enforceable permits;

WHEREAS, the United States has identified violations of certain provisions of the Clean Air Act, 42 U.S.C. §7401 et seq., its implementing regulations, the relevant provisions of the Ohio SIP, and federally-enforceable permits related to leak detection and repair ("LDAR") services provided by a third party contractor at the Lima Refinery;

WHEREAS, the United States conducted a lengthy and detailed investigation of emission events at Premcor's refinery in Port Arthur, Texas, including, but not limited to, the emission events listed in Appendix T;

WHEREAS, Premcor has not answered or otherwise responded, and need not answer or otherwise respond, to the Complaint in light of the settlement memorialized in this Addendum;

WHEREAS, Premcor has waived any applicable federal or state requirements of statutory notice of the alleged violations;

WHEREAS, Premcor has denied and continues to deny the violations alleged in the Complaints and maintains its defenses to the alleged violations;

WHEREAS, by entering into this Addendum, Premcor has indicated that it is committed to pro-actively resolving the allegations of environmental concerns related to its operations raised in the Complaints;

WHEREAS, Premcor has, in the interest of settlement, agreed to undertake installation of significant air pollution control equipment and enhancements to air pollution management practices at its refineries to reduce air emissions;

WHEREAS, the parties agree that the installation of equipment and implementation of controls pursuant to this Addendum will achieve major improvements in air quality control, and also that certain actions that Premcor has agreed to take are expected to achieve advances in technology and other methods of air pollution control;

WHEREAS, projects undertaken pursuant to this Addendum are for the purposes of abating or controlling atmospheric pollution or contamination by removing, reducing, or preventing the creation of emission of pollutants ("pollution control facilities"), and as such, may be considered for certification as pollution control facilities by federal, state or local authorities;

WHEREAS, in anticipation of entry of this Addendum, Premcor has commenced or completed installation, operation and/or implementation of certain emission control technologies or work practices at various refineries governed by this Addendum;

WHEREAS, the State of Ohio is co-plaintiff in this action, and the Memphis Shelby County Health Department (collectively referred to herein as "Plaintiff-Interveners") has filed a Complaint in Intervention, alleging that Premcor was and is in violation of the applicable Clean Air Act State Implementation Plan ("SIP") and other state environmental statutory and regulatory requirements;

WHEREAS, Premcor has not answered or otherwise responded, and need not answer or otherwise respond, to the Complaints in Intervention in light of the settlement memorialized in this Addendum;

WHEREAS, the United States, Plaintiff-Interveners, and Premcor have consented to entry of this Addendum without trial of any issues;

WHEREAS, the United States, Plaintiff-Interveners, and Premcor have agreed that settlement of this action is in the best interest of the parties and in the public interest, and that entry of this Addendum without further litigation is the most appropriate means of resolving this matter;

WHEREAS, the objective of this Addendum is substantially to apply, in accordance with the specific provisions contained herein, the requirements of the Consent Decree to Premcor; and

WHEREAS, for ease of reference, each paragraph, part, or section in this Addendum corresponds with the related paragraph, part, or section in the Consent Decree, if any;

NOW, THEREFORE, without any admission of fact or law, and without any admission of the violations alleged in the Complaints, it is hereby ORDERED AND DECREED as follows:

I. JURISDICTION AND VENUE

1. The Complaints state a claim upon which relief can be granted against Premcor under Sections 113, 167 and 211 of the Clean Air Act, 42 U.S.C. §§ 7413, 7477 and 7545, Section 103(c) of the Comprehensive Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9603(c), Section 325(b) of the Emergency Planning and Community Right-to-Know Act ("EPCRA"), 42 U.S.C. § 11045(b), and 28 U.S.C. § 1355. This Court has jurisdiction of the subject matter herein and over the parties consenting hereto pursuant to 28 U.S.C. § 1345 and pursuant to Sections 113, 167, and 211 of the CAA, 42 U.S.C. §§ 7413, 7545 and 7477, Section 103 of CERCLA, 42 U.S.C. § 9603, and Section 304 of EPCRA, 42 U.S.C. § 11004.

2. Venue is proper under Section 113(b) of the Clean Air Act, 42 U.S.C. § 7413(b), and under 28 U.S.C. § 1391(b) and (c).

3. Notice of the commencement of this action has been given to the States of Ohio and Texas and the Memphis Shelby County Health Department in accordance with Section 113(a)(1) of the Clean Air

Act, 42 U.S.C. § 7413(a)(1), and as required by Section 113(b) of the Clean Air Act, 42 U.S.C. § 7413(b).

II. APPLICABILITY

4. The provisions of this Addendum shall apply to and be binding upon the United States, the Ohio Environmental Protection Agency ("Ohio EPA"), and the Memphis Shelby County Health Department, and upon Premcor, as well as Premcor's respective successors and assigns, and shall apply to each of the refineries identified herein until the Addendum is terminated with respect to such refinery pursuant to Part XXV (Termination); provided, however, that with respect to any obligation applicable to an individual Premcor Refinery pursuant to Parts IV through XXIV, inclusive, such obligation shall apply only to the specific Premcor corporate entity that owns such Refinery.

5. In the event that Premcor proposes to sell or transfer any of its refineries subject to this Addendum, then Premcor shall advise in writing to such proposed purchaser or successor-in-interest of the existence of this Addendum and provide a copy of the Addendum, and shall send a copy of such written notification by certified mail, return receipt requested, to EPA before such sale or transfer, if possible, but no later than the closing date of such sale or transfer. This provision does not relieve Premcor from having to comply with any applicable state or local regulatory requirement regarding notice and transfer of facility permits.

III. FACTUAL BACKGROUND

6. Among other facilities, Premcor operates four petroleum refineries in the United States for the manufacture of various petroleum-based products, including gasoline, diesel, and jet fuels, and other marketable petroleum by-products. Three of Premcor's refineries are subject to this Addendum, and the fourth is subject to a separate consent decree in United States v. Motiva Enterprises, et al., No. 01-cv-00978 (S.D. Tex.).

7. As more specifically described in Appendix A, Premcor's petroleum refineries subject to this Addendum are located at: Lima, Ohio; Memphis, Tennessee; and Port Arthur, Texas (hereinafter collectively, the "Premcor Refineries").

8. Reserved.

9. Petroleum refining involves the physical, thermal and chemical separation of crude oil into marketable petroleum products.

10. The petroleum refining process at the Premcor Refineries results in emissions of criteria air pollutants, including nitrogen oxides ("NOx"), carbon monoxide ("CO"), particulate matter ("PM"), sulfur dioxide ("SO_2"), as well as volatile organic compounds ("VOCs") and hazardous air pollutants ("HAPs"), including benzene. The primary sources of these emissions are the fluid catalytic cracking units ("FCCUs"), process heaters and boilers, the sulfur recovery plants, wastewater treatment systems, fugitive emissions, and flares.

11. Reserved.

IV. NOx Emissions Reductions from Heaters and Boilers

Program Summary: Premcor will implement a program to reduce NO_x emissions from refinery heaters and boilers greater than 40 MMBtu/hr (HHV) by committing to an interim system-wide weighted average concentration emission limit for NOx of 0.060 lbs./MMBtu, to be achieved by December 31, 2011, and a final system-wide weighted average concentration emission limit for NOx of 0.044 lbs./MMBtu, to be achieved by December 31, 2013.

12. Premcor shall implement at the Premcor Refineries various NOx emission reduction measures and techniques to achieve system-wide NOx emission levels for certain identified heaters and boilers at the Premcor Refineries. For purposes of this Addendum, "heaters and boilers" shall be defined to include any stationary combustion unit used for the purpose of burning fossil fuel for the purpose of (i) producing power, steam or heat by heat transfer, or (ii) heating a material for initiating or promoting a process or chemical reaction in which the material participates as a reactant or catalyst, but expressly excluding any turbine, internal combustion engine, duct burner, CO boiler, incinerator or incinerator waste heat boiler.

A. **Initial Inventory, Annual Update, and Compliance Plan for Premcor Refineries**

13. Appendix B to this Addendum (the "Initial Inventory") provides an initial list of all heaters and boilers at the Premcor Refineries for which heat input capacity is greater than 40 MMBtu/hr (HHV). For purposes of this Addendum, "Covered Heaters and Boilers" shall include all heaters and boilers with heat input capacity greater than 40 MMBtu/hr (HHV) regardless of any applicable firing rate permit limitations. However, the FCCU startup heaters at the Port Arthur Refinery designated as B-103A and B-103B will not be considered Covered Heaters provided that each heater is fired no more than 500 hours in any calendar year. Premcor will include this limitation in an operating permit pursuant to Paragraph 291.

14. The Initial Inventory identifies previously constructed heaters and boilers at the Premcor Refineries that comprise the initial list of Covered Heaters and Boilers. The Initial Inventory also provides the following information concerning the Covered Heaters and Boilers:

a. Premcor's designations for each of the Covered Heaters and Boilers;

b. Identification of heat input capacity, and the source of such identification, for each of the Covered Heaters and Boilers. For purposes of this subparagraph, heat input capacity for each Covered Heater or Boiler shall equal the lesser of any applicable permit limit or Premcor's best then-current estimate of its maximum heat input capacity (hereinafter, "Heat Input Capacity");

c. Identification of all applicable NOx emission limitations, in pounds per million Btu, for each of the Covered Heaters and Boilers; and

d. Statement of whether a continuous emission monitoring system ("CEMS") for NOx has been installed on the respective Covered Heater or Boiler.

15. Premcor shall submit to EPA an annual update to the Initial Inventory on or before March 31 of each calendar year from 2008 through 2013, inclusive (the "Annual Update Report"), provided, however, that Premcor shall not be obligated to submit any Annual Update Report after satisfying the provisions of Paragraphs 21 and 27. Premcor shall designate the final Annual Update

Report. The Annual Update Report shall revise any information included in the Initial Inventory or most recent Annual Update Report to the extent appropriate based upon the construction of a Covered Heater or Boiler or any change during the prior year to any of the previously existing Covered Heaters and Boilers, including the date of installation of any CEMS installed during the prior year. The Annual Update Report shall also include for each Covered Heater and Boiler the estimated actual emission rate in pounds of NOx per MMBtu heat input (HHV) and tons per year, and the type of data used to derive the emission estimate (i.e., emission factor, stack test, or CEMS data).

B. Interim Emission Reductions and Timeframes for Premcor Refineries

16. On or before December 31, 2008, Premcor shall submit to EPA a compliance plan for attainment, by December 31, 2011, of a system-wide weighted average, as determined in accordance with Paragraph 28, for Covered Heaters and Boilers of 0.060 lbs.-NOx/MMBtu (the "Interim Compliance Plan"). The Interim Compliance Plan is intended to reflect Premcor's then-current strategy for satisfying the requirements of Paragraph 17. Premcor shall not be bound by the terms of the Interim Compliance Plan.

17. By no later than December 31, 2011, Premcor shall install NOx control technologies on, or otherwise limit NOx emissions from, certain Covered Heaters and Boilers such that the system-wide weighted average, as determined in accordance with Paragraph 28, for NO_x emissions from the Covered Heaters and Boilers is no greater than 0.060 lbs.-NOx/MMBtu.

17A. In the context of satisfying the requirements of Paragraph 17, Premcor shall install controls at a minimum of three Covered Heaters and Boilers at each of the Premcor Refineries to achieve a NOx emission rate of no greater than 0.044 lbs-NOx/MMBtu at each selected heater and boiler by December 31, 2011. At least one of the three controlled Covered Heaters and Boilers at the Lima and Port Arthur Refineries will have a heat input capacity in excess of 150 MMBtu/hr.

18. Premcor shall select from among the Covered Heaters and Boilers those units for which NOx emissions shall be controlled or otherwise reduced so as to satisfy the requirements of Paragraphs 17 and 17A.

19. For the purposes of Paragraphs 17 and 17A and in the event that Premcor permanently ceases operation of any Covered Heaters or Boilers on or before December 31, 2011, then Premcor may include each such shutdown unit in its demonstration of compliance with Paragraphs 17 and 17A if Premcor notifies the appropriate permitting authority that such unit is no longer operational and requests the withdrawal or invalidation of any permit or permit provisions authorizing operation of such unit. For purposes of Premcor's demonstration under Paragraph 28 of compliance with Paragraph 17, the emissions of any such shutdown unit shall be equal to 0.000 lbs/MMBtu NOx, and the heat input attributed to any shutdown Covered Heater or Boiler shall be its Heat Input Capacity prior to shutdown.

C. **Final Emission Reductions and Deadlines for Premcor Refineries**

20. On or before December 31, 2010, Premcor shall submit to EPA a compliance plan for attainment by December 31, 2013, of a system-wide weighted average for Covered Heaters and Boilers of 0.044 lbs.-NOx/MMBtu (the "Compliance Plan"), as determined in accordance with Paragraph 28. The Compliance Plan is intended to reflect Premcor's then-current strategy for satisfying the requirements of Paragraph 21. Premcor shall not be bound by the terms of the Compliance Plan.

21. By no later than December 31, 2013, Premcor shall install NOx control technology on, or otherwise limit NOx emissions from, certain Covered Heaters and Boilers such that the system-wide weighted average, as determined in accordance with Paragraph 28, for NOx emission from the Covered Heaters and Boilers is no greater than 0.044 lbs.-NOx/MMBtu.

22. Premcor shall select from among the Covered Heaters and Boilers those units for which NOx emissions shall be controlled or otherwise reduced so as to satisfy the requirements of Paragraph 21.

23. For the purposes of Paragraph 21 in the event that, on or before December 31, 2013, Premcor permanently ceases operation of any Covered Heaters or Boilers, then Premcor may include each such shutdown unit in its demonstration of compliance with Paragraph 21 if Premcor notifies the appropriate permitting authority that such unit is no longer operational and requests the withdrawal or invalidation of any permit or permit provisions authorizing operation of such unit. For purposes of Premcor's demonstration under Paragraph 28 of compliance with Paragraph 21, the emissions of any such shutdown unit shall be equal to 0.000 lbs/MMBtu NOx, and the heat input attributed to any shutdown Covered Heater or Boiler shall be its Heat Input Capacity prior to shutdown.

D. Reserved

24. – 26. Reserved.

E. Compliance Demonstration

27. By no later than March 31, 2012, Premcor shall submit to EPA a report demonstrating compliance with Paragraph 17. By no later than March 31, 2014, Premcor shall submit to EPA a report demonstrating compliance with Paragraph 21. The compliance reports submitted pursuant to this paragraph shall include the following information for the relevant refineries, as applicable to Premcor's interim or final compliance demonstration:

a. The NOx emission limit for each Covered Heater or Boiler at the Premcor Refineries which is the least of the following: (i) the NOx emission limit, in pounds per MMBtu at HHV (as a 365-day rolling average if based on CEMS, or as a 3-hour average if based on stack tests) based upon any existing federally enforceable, non-Title V (permanent) permit condition, including such a condition as may be reflected in a consolidated permit (where applicable), of the Covered Heater or Boiler, or (ii) the NOx emission limit, in pounds per MMBtu at HHV, reflected in any permit application for a federally enforceable, non-Title V (permanent) permit, including a consolidated permit where such limit would also be permanent, submitted by Premcor for such Covered Heater or Boiler prior to the date of submittal of the Compliance Report. In the event that Premcor identifies a

NOx emission limit, in pounds per MMBtu at HHV, for a Covered Heater or Boiler pursuant to this paragraph based on a NOx emission limit then reflected in a pending permit application, Premcor shall not withdraw such application nor may Premcor seek to modify that application to increase the NOx emission limit reflected in such application without prior EPA approval.

b. Heat Input Capacity, in MMBtu/hr at HHV, for each Covered Heater and Boiler at the Premcor Refineries, including an explanation of any change relative to that reported in the most recent Annual Update.

c. A demonstration of compliance with Paragraph 17 or 21, as applicable, performed in accordance with Paragraph 28.

28. Premcor shall demonstrate compliance with the provisions of Paragraph 17 by the following inequality:

$$0.060 \geq [(\sum_{i}^{n} (EL_i \times HIR_i)) + IVN] / [\sum_{i}^{n} (HIR_i) + IVD]$$

Premcor shall demonstrate compliance with the provisions of Paragraph 21 by the following inequality:

$$0.044 \geq [(\sum_{i}^{n} (EL_i \times HIR_i)) + FVN] / [\sum_{i}^{n} (HIR_i) + FVD]$$

For the purposes of Paragraph 28:

EL_i = The relevant NOx Emission Limit for the Premcor Covered Heater or Boiler "i", in pounds per million Btu (HHV), as reported pursuant to Paragraph 27(a);

HIR_i = Heat Input Capacity of the Premcor Covered Heater or Boiler "i", in million Btu (HHV) per hour, as reported pursuant to Paragraph 27(b);

n = The total number of Covered Heaters and Boilers at the Premcor Refineries.

IVN = The summation, in pounds per hour, of the products of the relevant NOx Emission Limit [in lbs per million Btu (HHV)] and the Heat Input Capacity (in million Btu per hour) for each of the

Covered Heaters and Boilers as reported in the numerator in the interim compliance report (to be submitted by Valero to EPA by March 31, 2010) pursuant to Paragraph 27 of the Consent Decree.

IVD = The summation of the Heat Input Capacities in million Btu (HHV) per hour for all of the Covered Heaters and Boilers as reported in the denominator in the interim compliance report (to be submitted by Valero to EPA by March 31, 2010) pursuant to Paragraph 27 of the Consent Decree.

FVN = The summation, in pounds per hour, of the products of the relevant NOx Emission Limit [in lbs per million Btu (HHV)] and the Heat Input Capacity (in million Btu per hour) for each of the Covered Heaters and Boilers as reported in the numerator in the final compliance report (to be submitted by Valero to EPA by March 31, 2012) pursuant to Paragraph 27 of the Consent Decree.

FVD = The summation of the Heat Input Capacities in million Btu (HHV) per hour for all of the Covered Heaters and Boilers as reported in the denominator in the final compliance report (to be submitted by Valero to EPA by March 31, 2012) pursuant to Paragraph 27 of the Consent Decree.

F. Monitoring Requirements

29. By no later than December 31, 2013, for Covered Heaters and Boilers existing on the Date of Lodging for which Premcor takes an emission limit of <0.060 lbs NOx/MMBtu without adding additional controls to meet the requirement of Paragraphs 17 and 21; and beginning no later than 180 days after installing controls on a Covered Heater and Boiler for purposes of compliance with the requirement of Paragraphs 17 and 21, Premcor shall monitor each such Covered Heater or Boiler at the Premcor Refineries as follows:

a. For a Covered Heater or Boiler at the Premcor Refineries with a Heat Input Capacity of 150 MMBtu/hr (HHV) or greater, Premcor shall install or continue to operate a continuous emission monitoring system ("CEMS") for NOx;

b. For a Covered Heater or Boiler at the Premcor Refineries with a Heat Input Capacity greater than 100 MMBtu/hr (HHV) but less than or equal to 150 MMBtu/hr (HHV), Premcor shall install or continue to operate a CEMS for NOx, or monitor NOx emissions with a predictive emissions monitoring system ("PEMS") developed and operated pursuant to the requirements of Appendix S of this Addendum;

c. For a Covered Heater or Boiler at the Premcor Refineries with a Heat Input Capacity of less than or equal to 100 MMBtu/hr(HHV), Premcor shall conduct an initial performance test and any periodic tests that may be required by EPA or by the applicable State or local permitting authority under applicable regulatory authority. Premcor shall report the results of the initial performance testing to EPA and the appropriate Plaintiff-Intervener. Premcor shall use Method 7E or an EPA-approved alternative test method to conduct initial performance testing for NOx emissions required by this subparagraph (c).

Nothing in this Addendum shall preclude a facility from converting a 3-hour rolling average limit to the same limit expressed as a 365-day rolling average limit if such demonstration of compliance is based upon CEMS or PEMS.

30. Premcor shall install, certify, calibrate, maintain and operate all NOx CEMS required by Paragraph 29 in accordance with the provisions of 40 C.F.R. Section 60.13 that are applicable to CEMS (excluding those provisions applicable only to continuous opacity monitoring systems) and Part 60, Appendices A and F, and the applicable performance specification of 40 C.F.R. Part 60, Appendix B. With respect to 40 C.F.R. Part 60, Appendix F, in lieu of the requirements of 40 C.F.R. Part 60, Appendix F §§ 5.1.1, 5.1.3 and 5.1.4., Premcor must conduct either a Relative Accuracy Audit ("RAA") or a Relative Accuracy Test Audit ("RATA") on each CEMS required by Paragraph 29 at least once every three (3) years. Premcor must also conduct Cylinder Gas Audits ("CGA") each calendar quarter during which a RAA or a RATA is not performed.

G. Reserved

31. – 33. Reserved.

H. Additional Provisions

34. Nothing in this Addendum is intended to limit Premcor from satisfying any provisions of this Part IV earlier than the applicable compliance date specified in this part.

V. NOx EMISSION REDUCTIONS FROM FCCUs

Program Summary: Premcor will implement a program to limit NOx emissions from its FCCU regenerators by achieving a system-wide average of unit-specific NOx concentration emission limits for each of the FCCUs subject to this Part V.

A. – F. Reserved

35. – 44. Reserved.

G. FCCU NOx Emission Reductions

45. Premcor shall attain a system-wide, coke burn-weighted average of NOx concentration emission limits for each FCCU at the Premcor Refineries (hereinafter collectively referred to as "Covered FCCUs") in accordance with the provisions of this Section G.

45A. On or before December 31, 2011, Premcor shall complete an optimization study of the oxygen control system (O_2 CS) on the FCCUs at the Lima and Memphis Refineries in an effort to achieve NOx concentration emissions of 20 ppmvd (at 0% O_2) as a 365-day rolling average and 40 ppmvd (at 0% O_2) as a 7-day rolling average. Within sixty days after the conclusion of each optimization study, Premcor shall submit to EPA and the appropriate Plaintiff-Intervener reports detailing the NOx concentration emissions for the FCCUs through the optimization of the O_2 CS.

46. Appendix C to this Addendum (the "Initial FCCU Annual Coke Burn Rates") provides a list of all Covered FCCUs, as of the Date of Lodging. Appendix C also identifies Premcor's best estimate of maximum coke burn rate and any permit limits applicable to maximum coke burn rate for each such FCCU, as of the Date of Lodging.

47. Premcor shall submit to EPA an annual update to Appendix C on or before March 31 of each calendar year from 2009 through 2014, inclusive (the "Annual FCCU Update Report"), provided, however, that Premcor shall not be obligated to submit any Annual Update Report after satisfying the provisions of Paragraphs 55 and 56. The Annual FCCU Update Report shall identify Premcor's best estimate of maximum coke burn rate and any permit limits relating to maximum coke burn rate for

each Covered FCCU as of the date of the report. Premcor shall identify and explain any such differences from the previous report under Paragraph 46 and this Paragraph 47.

48. Premcor shall attain the following system-wide, coke burn-weighted average of NOx concentration emission limits for Covered FCCUs by the following dates: (a) an interim NOx concentration emission limit average of 69.2 ppmvd (at 0% O_2), as a 365-day rolling average, by December 31, 2010 (the "Interim NOx System-Wide Average"), as determined in accordance with Paragraph 54 and (b) a final NOx concentration emission limit average of 33.4 ppmvd (at 0% O_2), as a 365-day rolling average, by December 31, 2013 (the "NOx System-Wide Average"), as determined in accordance with Paragraph 56.

49. Premcor shall select from among the Covered FCCUs those units for which NOx emissions shall be controlled or otherwise reduced so that Premcor satisfies the Interim NOx System-Wide Average and the NOx System-Wide Average. Provided however, no Covered FCCU will have a permit limit higher than 80 ppmvd at 0% O_2 on a 365-day rolling average at the time it demonstrates compliance with Paragraph 48(b).

50. For the purposes of Premcor's satisfaction of Paragraph 48(a) and in the event that, subsequent to the Date of Entry of this Addendum and before December 31, 2010, Premcor permanently ceases operation of any Covered FCCU at the Premcor Refineries, then Premcor may include each such shutdown unit in its demonstration of compliance with the Interim NOx System-Wide Average, if Premcor notifies the appropriate permitting authority that such unit is no longer operational and requests the withdrawal or invalidation of any permit or permit provisions authorizing operation of such unit. For purposes of Premcor's demonstration under Paragraphs 53 and 54 of compliance with the Interim NOx System-Wide Average, the emissions rate of any such shutdown unit shall be equal to 20 ppmvd NOx at 0% O_2, and the maximum coke burn rate attributed to any such shutdown FCCU shall equal the lesser of Premcor's best estimate of maximum coke burn rate or the FCCU's permit limit relating to maximum coke burn rate prior to the FCCU shutdown, provided,

however, that if a new FCCU is also constructed and operated at such refinery, then the maximum coke burn rate and the NOx emission limit of such new FCCU shall be used in lieu of the original Covered FCCU.

51. For purposes of this Section V.G, "maximum coke burn rate" shall mean the lesser of the permitted coke burn rate, if any, or Premcor's best current estimate on an average annual basis.

52. For the purposes of Premcor's satisfaction of Paragraph 48(b) and in the event that Premcor permanently ceases operation of any Covered FCCU subsequent to the Date of Entry of this Addendum and before December 31, 2013, then Premcor may include each such shutdown unit in its demonstration of compliance with the NOx System-Wide Average, if Premcor notifies the appropriate permitting authority that such unit is no longer operational and requests the withdrawal or invalidation of any permit or permit provisions authorizing operation of such unit. For purposes of Premcor's demonstration under Paragraphs 55 and 56 of compliance with the NOx System-Wide Average, the concentration emission limit of any such shutdown unit shall be equal to 20 ppmvd NOx at 0% O_2, and the maximum coke burn rate attributed to any such Covered FCCU that is shutdown shall equal the lesser of Premcor's best estimate of maximum coke burn rate or the FCCU's permit limit relating to maximum coke burn rate prior to the FCCU shutdown, provided, however, that if a new FCCU is also constructed and operated at such refinery, then the maximum coke burn rate and the NOx emission limit of such new FCCU shall be used in lieu of the original Covered FCCU.

53. Compliance Demonstration: By March 31, 2011, Premcor shall submit to EPA a report demonstrating compliance with the Interim NOx System-Wide Average. The compliance report submitted pursuant to this paragraph shall include the following information for the relevant refineries, as applicable to Premcor's compliance demonstration:

a. The NOx concentration emission limit for each Covered FCCU at the Premcor Refineries which is the least of the following: (i) the allowable NOx concentration emission limit (as a 365-day average), based upon any existing, federally enforceable non-Title V permit condition,

including such a condition as may be reflected in a consolidated permit (where applicable), or (ii) the NOx concentration emission limit reflected in any application for a federally enforceable non-Title V permit, including a consolidated permit, where such limit would also be permanent, submitted by Premcor for such Covered FCCU prior to the date of submittal of the compliance report. In the event that Premcor identifies a NOx concentration emission limit for a Covered FCCU pursuant to this paragraph based on a NOx concentration emission limit then reflected in a pending permit application, Premcor shall not withdraw such application nor may Premcor seek to modify that application, nor request an increase in the NOx concentration emission limit reflected in such application, without prior EPA approval.

b. Reserved.

c. A demonstration of compliance with the Interim NOx System-Wide Average performed in accordance with Paragraph 54.

54. Premcor shall demonstrate compliance with the Interim NOx System-Wide Average by meeting the following inequality:

$$69.2 \geq [(\sum_{i}^{n} (EL_i \times HIR_i)) + IVN] / [(\sum_{i}^{n} HIR_i) + IVD]$$

Where:

EL_i = The relevant NOx concentration emission limit for the Covered FCCU "i" at the Premcor Refineries, in parts per million, as reported pursuant to Paragraph 53(a);

HIR_i = Maximum coke burn rate of the Covered FCCU "i" at the Premcor Refineries, as reported pursuant to Paragraph 47;

n = The total number of Covered FCCUs at the Premcor Refineries

IVN = The summation of the products of the relevant NOx concentration emission limit (in parts per million) and the Maximum coke burn rate for each Covered FCCU and the Golden Eagle FCCU as reported in the numerator pursuant to Paragraph 53 of the Consent Decree.

IVD = The summation of the Maximum coke burn rates for all Covered FCCUs and the Golden Eagle FCCU as reported in the denominator pursuant to Paragraph 53 of the Consent Decree.

55. Compliance Demonstration: By March 31, 2014, Premcor shall submit to EPA a report demonstrating compliance with the NOx System-Wide Average. The compliance report submitted pursuant to this paragraph shall include the following information for the relevant refineries, as applicable to Premcor's compliance demonstration:

a. The NOx emission limit for each Covered FCCU at the Premcor Refineries which is the least of the following: (i) the allowable NOx concentration emission limit (as a 365-day average), based upon any existing, federally enforceable non-Title V permit condition, including such a condition as may be reflected in a consolidated permit (where applicable), or (ii) the NOx concentration emission limit reflected in any application for a federally enforceable non-Title V permit, including a consolidated permit, where such limit would also be permanent, submitted by Premcor for such Covered FCCU prior to the date of submittal of the compliance report. In the event that Premcor identifies a NOx concentration emission limit for a Covered FCCU pursuant to this paragraph based on a NOx concentration emission limit then reflected in a pending permit application, Premcor shall not withdraw such application nor may Premcor seek to modify that application, nor request an increase in the NOx concentration emission limit reflected in such application without prior EPA approval.

b. Reserved.

c. A demonstration of compliance with the NOx System-Wide Average performed in accordance with Paragraph 56.

56. Premcor shall demonstrate compliance with the NOx System-Wide Average by meeting the following inequality:

$$33.4 \geq [(\sum_{i}^{n} EL_i \times HIR_i) + FVN] / [(\sum_{i}^{n} HIR_i) + FVD]$$

Where:

EL_i = The relevant NOx concentration emission limit for the Covered FCCU "i", in parts per million, as reported pursuant to Paragraph 55(a);

HIR_i = Maximum coke burn rate of the Covered FCCU "i" at the Premcor Refineries, as reported pursuant to Paragraph 47;

n = The total number of Covered FCCUs at the Premcor Refineries.

FVN = The summation of the products of the relevant NOx concentration emission limit (in parts per million) and the Maximum coke burn rate for each Covered FCCU and the Golden Eagle FCCU as reported in the numerator pursuant to Paragraph 55 of the Consent Decree.

FVD = The summation of the Maximum coke burn rates for all Covered FCCU's and the Golden Eagle FCCU as reported in the denominator pursuant to Paragraph 55 of the Consent Decree.

57. – 58. Reserved.

H. Additional Provisions

59. Notwithstanding any provision of this Addendum to the contrary and in lieu of complying with any NOx emission control requirements established pursuant to this Part V, Premcor may elect to achieve NOx concentration emission limits of 20 ppmvd (at 0% O_2) or less as a 365-day rolling average and 40 ppmvd (at 0% O_2) or less as a 7-day rolling average by permanently shutting down such FCCU or FCCU-regenerator, or by application of any emission reduction method or technology, including any technology not specified in this Addendum, by the refinery-specific compliance date specified in this Part V. Premcor's election to satisfy its obligations under this Part V through compliance with this paragraph shall not limit the applicability or extent of Part XXIV (Effect of Settlement) with respect to such Covered FCCU.

60. Premcor shall take such action as may be necessary to ensure that each 365-day rolling average NOx emission limit used to demonstrate compliance under Paragraphs 55 and 56 is less than or equal to 80 ppm. In addition and as part of each permit or permit application under Paragraphs 55 and 56, Premcor shall also have or have applied for a 7-day rolling average NOx concentration emission limit that shall be numerically twice the 365-day rolling average NOx concentration emission limit used for that FCCU to demonstrate compliance under Paragraphs 55 and 56.

I. CEMS

61. Beginning no later than the Date of Entry for each Covered FCCU, Premcor shall use NOx and O_2 CEMS to monitor performance of the FCCU and to report compliance with the terms and conditions of this Addendum.

62. The CEMS will be used to demonstrate compliance with the respective NOx concentration emission limits established pursuant to this Part V. Premcor shall make CEMS data available to EPA and any appropriate Plaintiff-Intervener upon demand as soon as practicable. Premcor shall install, certify, calibrate, maintain and operate all CEMS required by this paragraph in accordance with the provisions of 40 C.F.R. § 60.13 that are applicable to CEMS (excluding those provisions applicable only to continuous opacity monitoring systems) and Part 60, Appendices A and F, and the applicable performance specification test of 40 C.F.R. Part 60, Appendix B. With respect to 40 C.F.R. Part 60 Appendix F, in lieu of the requirements of 40 C.F.R. Part 60, Appendix F §§ 5.1.1, 5.1.3 and 5.1.4, Premcor must conduct either a RAA or a RATA on each CEMS at least once every three (3) years. Premcor must also conduct CGA each calendar quarter during which a RAA or a RATA is not performed.

63. Reserved.

VI. SO_2 Emission Reductions from FCCUs

Program Summary: Premcor shall implement a program to reduce SO_2 emissions from their FCCUs, which shall include the commitment to limit SO_2 emissions from the Memphis and Port Arthur FCCUs to specific concentrations and otherwise limit SO_2 emissions from the Lima FCCU through the use of SO_2-reducing catalyst additives.

A. – L. Reserved

64. – 82. Reserved.

M. Additional Provisions

83. Provisions for reduction of SO_2 emissions from Premcor refineries.

a. Memphis. Upon Date of Entry of this Addendum, Premcor shall comply with SO_2 concentration emission limits at the point of emission from the Memphis Refinery FCCU to the

atmosphere of no greater than 25 ppmvd measured as a 365-day rolling average and 50 ppmvd measured as a 7-day rolling average, both at 0% O_2, and will continue to operate a wet gas scrubber at the Memphis Refinery FCCU.

b. Port Arthur. Upon Date of Entry of this Addendum, Premcor shall comply with SO_2 concentration emission limits at the point of emission from the Port Arthur Refinery FCCU to the atmosphere of no greater than 25 ppmvd measured as a 365-day rolling average and 50 ppmvd measured as a 7-day rolling average, both at 0% O_2, and will continue to operate a wet gas scrubber at the Port Arthur Refinery FCCU.

c. Lima. Premcor shall commence implementation of the SO_2 adsorbing catalyst additive protocol described in Appendix E.

84. Reserved.

85. Premcor may elect to submit for approval by EPA, after an opportunity for consultation with the Ohio EPA, a plan for the operation of the Lima FCCU (including associated air pollution control equipment) during hydrotreater outages. Any such plan shall provide for the minimization of emissions during hydrotreater outages to the extent practicable. The plan shall consider, at a minimum, the use of low sulfur feed, storage of hydrotreated feed and an increase in additive addition rate. Any short term emission limits established for the Lima FCCU pursuant to this Addendum shall not apply during periods of hydrotreater outage provided that Premcor is in compliance with any plan submitted by Premcor under this paragraph for the Lima FCCU, and is maintaining and operating the FCCU in a manner consistent with good air pollution control practices. In order for the relief for short-term emission limits afforded by this paragraph to apply to a period of hydrotreater outage, Premcor shall comply with the plan approved by EPA under this paragraph at all times, including periods of startup, shutdown or malfunction of the hydrotreater. In addition, in the event that Premcor asserts that the basis for a specific hydrotreater outage for which Premcor seeks to secure the relief from short term emission limits provided under this paragraph is a shutdown (where no catalyst change out occurs)

required by ASME pressure vessel requirements or applicable state boiler requirements, Premcor shall submit to EPA a report that identifies the relevant requirements and justifies Premcor's decision to implement the shutdown during the selected time period. For the purposes of this Paragraph 85, "hydrotreater" shall include any units that hydrotreat or otherwise desulfurize FCCU feedstocks.

86. Notwithstanding any provision of this Addendum to the contrary, Premcor may elect to limit emissions from the Lima FCCU to SO_2 concentrations of 25 ppmvd or less, measured as a 365-day rolling average, and 50 ppmvd or less, measured as a 7-day rolling average, each at 0% O_2, including without limitation by permanently shutting down such FCCU or by application of any emission reduction method or technology, including any technology not specified in this Addendum. Notwithstanding any provision of this Addendum to the contrary and in lieu of complying with any specific SO_2 emission control requirements established pursuant to this Part VI for a WGS, Premcor may elect to shut down such Refinery's FCCU. In the event that Premcor elects to demonstrate compliance with this Part VI for the Lima FCCU by complying with this paragraph, then Premcor must achieve compliance with this paragraph for the Lima FCCU by no later than the refinery-specific compliance date for completion of the demonstration period identified in Appendix E or as otherwise specified in this Part VI. Premcor's election to satisfy its obligations under this Part VI for any Premcor Refinery subject to this Addendum through compliance with this paragraph shall not limit the applicability or extent of Part XXIV (Effect of Settlement) with respect to such FCCU.

87. – 88. Reserved.

N. **Monitoring Emissions and Demonstrating Compliance**

89. Beginning no later than the Date of Entry for each covered FCCU, Premcor shall use SO_2 and O_2 CEMS to monitor performance of the FCCU and to report compliance with the terms and conditions of this Addendum.

90. CEMS will be used to demonstrate compliance with the respective SO_2 concentration emission limits established pursuant to this Part VI. Premcor shall make CEMS data available to EPA

and any appropriate Plaintiff-Intervener upon demand as soon as practicable. Premcor shall install, certify, calibrate, maintain and operate all CEMS required by this paragraph in accordance with the provisions of 40 C.F.R. § 60.13 that are applicable to CEMS (excluding those provisions applicable only to continuous opacity monitoring systems) and Part 60, Appendices A and F, and the applicable performance specification test of 40 C.F.R. Part 60, Appendix B. With respect to 40 C.F.R. Part 60 Appendix F, in lieu of the requirements of 40 C.F.R. Part 60, Appendix F §§ 5.1.1, 5.1.3 and 5.1.4, Premcor must conduct either a RAA or a RATA on each CEMS at least once every three (3) years. Premcor must also conduct a CGA each calendar quarter during which a RAA or a RATA is not performed.

91. Reserved.

92. All CEMS data collected by Premcor during the effective life of the Addendum shall be made available by Premcor to EPA upon demand as soon as practicable.

93. Reserved.

VII. CO, OPACITY AND PARTICULATE EMISSIONS FROM FCCUs

Program Summary: Premcor shall implement a program to limit CO and particulate emissions from its FCCUs and shall implement monitoring at each FCCU sufficient to demonstrate compliance with emission standards specified in this Part.

94. CO Emission Standard. Premcor shall limit CO emissions from the Covered FCCUs at the Premcor Refineries to 500 ppmvd (at 0% O_2), measured as a one-hour block average, in accordance with the schedule identified herein.

95. Particulate Emission Standard. Premcor shall limit particulate emissions from the Covered FCCUs at the Premcor Refineries to one (1) pound per 1,000 pounds of coke burned (front half only according to Method 5B or 5F, as appropriate), measured as a one-hour average over three performance test runs, in accordance with the schedule identified herein.

96. Except as specified in Paragraph 104 and by no later than ninety (90) days from the Date of Entry of this Addendum, Premcor shall ensure that the FCCUs located at the Memphis and

Port Arthur Refineries shall comply with the CO, opacity and particulate emission standards specified in Paragraphs 94 and 95, respectively, and all applicable requirements of 40 C.F.R. Part 60, Subparts A and J, as such requirements relate to CO, opacity and particulate emissions from FCCU regenerators.

97. By no later than ninety (90) days from the Date of Entry of this Addendum, Premcor shall ensure that the FCCU located at the Lima Refinery shall comply with the CO emission standard specified in Paragraph 94, and all applicable requirements of 40 C.F.R. Part 60, Subparts A and J, as such requirements relate to CO emissions from FCCU regenerators.

98. By no later than December 31, 2013, Premcor shall ensure that the FCCU located at the Lima Refinery complies with the opacity and particulate emission standards specified in Paragraph 95 and all applicable requirements of 40 C.F.R. Part 60, Subparts A and J, as such requirements relate to opacity and particulate emissions from FCCU regenerators.

99. Reserved.

100. Lodging of this Addendum shall satisfy any obligation otherwise applicable to Premcor to provide notification in accordance with 40 C.F.R. Part 60, Subparts A and J, including without limitation 40 C.F.R. § 60.7, with respect to the provisions of 40 C.F.R. Part 60, Subparts A and J, as such requirements relate to CO, opacity and particulate emissions from FCCU regenerators.

101. CEMS or an EPA approved alternative monitoring plan or monitoring waiver will be used to demonstrate compliance with the respective CO emission limits established pursuant to this Part VII. Premcor shall make CEMS data available to EPA and any appropriate Plaintiff-Intervener upon demand as soon as practicable. Premcor shall install, certify, calibrate, maintain and operate all CEMS required by this paragraph in accordance with the provisions of 40 C.F.R. § 60.13 that are applicable to CEMS (excluding those provisions applicable only to continuous opacity monitoring systems) and Part 60, Appendices A and F, and the applicable performance specification test of 40 C.F.R. Part 60, Appendix B. With respect to 40 C.F.R. Part 60 Appendix F, in lieu of the requirements of 40 C.F.R. Part 60, Appendix F §§ 5.1.1, 5.1.3 and 5.1.4, Premcor must conduct either a RAA or a

RATA on each CEMS at least once every three (3) years. Premcor must also conduct a CGA each calendar quarter during which a RAA or a RATA is not performed. To the extent that Premcor has conducted any performance testing of the relevant unit for PM emissions, and such performance testing was conducted in accordance with the procedures specified in EPA Method 5B or 5F, as appropriate, or 40 C.F.R. Part 63, Subpart UUU, and demonstrated compliance with the emission limits established under this part, then such performance testing shall satisfy any obligation otherwise applicable under this Part to conduct performance testing under 40 C.F.R. Part 60, Subparts A and J. Any future performance testing performed by Premcor to demonstrate compliance with the particulate emission limitations established by this Part shall be conducted in accordance with EPA Method 5B or 5F, as appropriate, set forth at 40 C.F.R. Part 60, Appendix A.

102. The CO, opacity, and particulate limits established pursuant to this Part VII shall not apply during periods of startup, shutdown or malfunction of the FCCUs or malfunction of the applicable CO or particulate control equipment, if any, provided that during startup, shutdown or malfunction, Premcor shall, to the extent practicable, maintain and operate the relevant affected facility, including associated air pollution control equipment, in a manner consistent with good air pollution control practices for minimizing emissions.

103. Continuous Opacity Monitoring System (COMS) or an approved AMP will be used to demonstrate compliance with the respective opacity limits established pursuant to this Part VII. Premcor shall make any COMS data available to EPA and any appropriate Plaintiff-Intervener upon demand as soon as practicable. Premcor shall install, certify, calibrate, maintain and operate all COMS required by this paragraph in accordance with the provisions of 40 C.F.R. §60.11, §60.13, and Part 60 Appendix A, and the applicable performance specification test in 40 C.F.R. Part 60 Appendix B.

104. Within 180 days of the Date of Entry of the Addendum, Premcor will have submitted or shall submit to EPA complete opacity alternative monitoring plan ("AMP") applications for the FCCUs located at Memphis and Port Arthur. If such AMPs are not approved, Premcor shall within

ninety (90) days of receiving notice of such disapproval either invoke the dispute resolution provisions of Part XXIII or submit to EPA for approval, with a copy to the appropriate Plaintiff-Intervener, a plan and schedule that provides for compliance with the applicable monitoring requirements under NSPS Subpart J as soon as practicable. Such plan may include a revised AMP application, physical or operational changes to the equipment, or additional or different monitoring. These FCCUs shall not be subject to the applicable requirements of 40 C.F.R. Part 60, Subparts A and J, as such requirements relate to opacity from FCCU regenerators until EPA approves AMPs for opacity or Premcor complies with the above-identified requirements of this paragraph.

105. Reserved.

106. Nothing in this Addendum shall be interpreted to limit Premcor's opportunity to propose to EPA an alternative compliance monitoring plan (AMP) under 40 C.F.R. Part 60, Subpart A, for CO, opacity or particulate emissions from FCCUs under NSPS Subpart J.

VIII. NSPS APPLICABILITY TO SO_2 EMISSIONS FROM FCCU REGENERATORS

Program Summary: Premcor shall comply with all requirements of 40 C.F.R. Part 60, Subparts A and J, as such provisions relate to SO_2 emissions from FCCU Regenerators, by the deadlines specified in this Part.

107. Premcor's FCCU Regenerators at the following refineries shall be "affected facilities" pursuant to 40 C.F.R. Part 60, Subpart J, and shall comply with all requirements of 40 C.F.R. Part 60, Subparts A and J, as such provisions relate to SO_2 emissions from FCCU Regenerators, on the following dates:

a. Lima Regenerator – December 31, 2010, or as specified in Paragraph 111

b. Memphis Regenerator – Upon Date of Entry

c. Port Arthur Regenerator – Upon Date of Entry

108. Lodging of this Addendum shall satisfy any obligation otherwise applicable to Premcor to provide notification in accordance with 40 C.F.R. Part 60, Subparts A and J, including without

limitation 40 C.F.R. § 60.7, with respect to the provisions of 40 C.F.R. Part 60, Subparts A and J, as such provisions relate to SO_2 emissions from FCCU Regenerators.

109. CEMS will be used to demonstrate compliance with the respective SO_2 emission limits established pursuant to this Part VIII. Premcor shall make CEMS data available to EPA and any appropriate Plaintiff-Intervener upon demand as soon as practicable. Premcor shall install, certify, calibrate, maintain and operate all CEMS required by this paragraph in accordance with the provisions of 40 C.F.R. § 60.13 that are applicable to CEMS (excluding those provisions applicable only to continuous opacity monitoring systems) and Part 60, Appendices A and F, and the applicable performance specification test of 40 C.F.R. Part 60, Appendix B. With respect to 40 C.F.R. Part 60 Appendix F, in lieu of the requirements of 40 C.F.R. Part 60, Appendix F §§ 5.1.1, 5.1.3 and 5.1.4, Premcor must conduct either a RAA or a RATA on each CEMS at least once every three (3) years. Premcor must also conduct a CGA each calendar quarter during which a RAA or a RATA is not performed.

110. The SO_2 limits established pursuant to this Part shall not apply during periods of startup, shutdown or malfunction of the FCCUs and hydrotreaters, or the malfunction of SO_2 control equipment, if any, provided that during startup, shutdown or malfunction, Premcor shall, to the extent practicable, maintain and operate the relevant affected facility, including associated air pollution control equipment, in a manner consistent with good air pollution control practices for minimizing emissions.

111. By December 31, 2008, Premcor shall submit to EPA a complete alternative monitoring plan ("AMP") application for NSPS Subpart J monitoring for SO_2 at the Lima FCCU. If such AMP is not approved, Premcor shall within ninety (90) days of receiving notice of such disapproval either invoke the dispute resolution provisions of Part XXIII or submit to EPA for approval, with a copy to the appropriate Plaintiff-Intervener, a plan and schedule that provides for compliance with the applicable monitoring requirements under NSPS Subpart J as soon as practicable. Such plan may

include a revised AMP application, physical or operational changes to the equipment, or additional or different monitoring.

112. Nothing in this Addendum shall be interpreted to limit Premcor's opportunity to propose to EPA an alternative compliance monitoring plan under 40 C.F.R. Part 60, Subpart A, for SO_2 emissions from FCCU regenerators.

IX. SO_2 AND NSPS REQUIREMENTS FOR HEATERS AND BOILERS

Program Summary: Premcor shall undertake the following measures at the Premcor Refineries to reduce SO_2 emissions from heaters and boilers by eliminating or minimizing the burning of fuel oil, and satisfying the provisions of 40 C.F.R. Part 60, Subparts A and J, as such provisions apply to fuel gas combustion devices.

113. By no later than the Date of Entry, Premcor shall discontinue the burning or combustion of Fuel Oil in any of the heaters and boilers at the Premcor Refineries, except as provided in Paragraph 114. For purposes of this Addendum, "Fuel Oil" shall mean fuel that is predominantly in the liquid phase at the point of combustion with a sulfur content of greater than 0.05% by weight.

114. Notwithstanding any provision of this Addendum to the contrary, Fuel Oil may be combusted or burned during periods of natural gas curtailment by suppliers or during periods approved by EPA for purposes of test runs and operator training at any refinery subject to this Addendum. During any such period of natural gas curtailment, test runs or operator training, only low sulfur (0.2% sulfur until December 31, 2009, 0.05 wt % sulfur thereafter) Fuel Oil shall be combusted or burned. Prior to conducting test runs or operator training at a refinery during which Fuel Oil will be burned pursuant to this paragraph, Premcor shall submit proposed schedules for such test runs or training periods to EPA for review and approval. In the event that EPA does not respond to such proposed schedules within thirty (30) days of submission pursuant to this paragraph, then such proposed schedules shall be deemed approved in accordance with the proposals submitted.

115. Except as provided in Paragraph 118, by no later than sixty (60) days after the Date of Entry, Premcor shall ensure that all heaters and boilers located at the Premcor Refineries are "affected facilities" as fuel gas combustion devices, for purposes of 40 C.F.R. Part 60, Subpart J, and shall

comply with all requirements of 40 C.F.R. Part 60, Subparts A and J, as such requirements apply to fuel gas combustion devices.

116. – 117. Reserved.

118. By no later than the date specified in Paragraph 115, all heaters and boilers at such refineries shall comply with the applicable requirements of NSPS Subpart A and J for fuel gas combustion devices, except for those heaters or boilers listed in Appendix O, which shall be affected facilities and shall be subject to and comply with the requirements of NSPS Subparts A and J for fuel gas combustion devices by the dates listed in Appendix O. All CEMS installed pursuant to this paragraph shall be installed, certified, calibrated, maintained and operated in accordance with the applicable requirements of 40 C.F.R. §§ 60.11 and 60.13 and 40 C.F.R. Part 60, Appendix F as provided in Paragraph 121 below.

119. Within two (2) years of Entry of the Addendum, Premcor may submit to EPA and the appropriate Plaintiff-Intervener complete alternative monitoring plan ("AMP") applications for NSPS Subpart J monitoring of fuel gas combustion devices. If such AMP is not approved, then within ninety (90) days of receiving notice of such disapproval, Premcor shall submit to EPA for approval, with a copy to the appropriate Plaintiff-Intervener, a plan and schedule that provides for compliance with the applicable monitoring requirements under NSPS Subpart J as soon as practicable. Such plan may include a revised AMP application, physical or operational changes to the equipment, or additional or different monitoring. For some heaters and boilers that combust low-flow VOC streams from vents, pumpseals and other sources, it is anticipated that some AMP applications will rely in part on calculating a weighted average H_2S concentration of all VOC and fuel gas streams that are burned in a single heater or boiler and demonstrating with alternative monitoring that either the SO_2 emissions from the heater or boiler will not exceed 20 ppm or that the weighted average H_2S concentration is not likely to exceed 162 ppm H_2S. EPA shall not reject an AMP solely due to the AMP's use of one of these approaches to demonstrate compliance with NSPS Subpart J.

120. Lodging of this Addendum shall satisfy any obligation otherwise applicable to Premcor to provide notification in accordance with 40 C.F.R. Part 60, Subparts A and J, including without limitation 40 C.F.R. § 60.7, with respect to the provisions of 40 C.F.R. Part 60, Subparts A and J, as such requirements apply to fuel gas combustion devices.

121. The CEMS or approved AMPs will be used to demonstrate compliance with the respective H_2S/SO_2 concentration emission limits established pursuant to this Part IX. Premcor shall make CEMS data available to EPA and any appropriate Plaintiff-Intervener upon demand as soon as practicable. Premcor shall install, certify, calibrate, maintain and operate all CEMS required by this paragraph in accordance with the provisions of 40 C.F.R. § 60.13 that are applicable to CEMS (excluding those provisions applicable only to continuous opacity monitoring systems) and Part 60, Appendices A and F, and the applicable performance specification test of 40 C.F.R. Part 60, Appendix B. With respect to 40 C.F.R. Part 60 Appendix F, in lieu of the requirements of 40 C.F.R. Part 60, Appendix F §§ 5.1.1, 5.1.3 and 5.1.4, Premcor must conduct either a RAA or a RATA on each CEMS at least once every three (3) years. Premcor must also conduct a CGA each calendar quarter during which a RAA or a RATA is not performed.

122. The SO_2 limits established pursuant to this Part shall not apply during periods of startup, shutdown or malfunction of the heaters and boilers or the malfunction of SO_2 control equipment, if any, provided that during startup, shutdown or malfunction, Premcor shall, to the extent practicable, maintain and operate the relevant affected facility including associated air pollution control equipment in a manner consistent with good air pollution control practices for minimizing emissions.

X. BENZENE WASTE NESHAP PROGRAM ENHANCEMENTS

Program Summary: Premcor shall undertake the following measures to minimize fugitive benzene waste emissions at each of the Refineries that are covered by this Addendum.

123. Premcor agrees to undertake the measures set forth in this Part X, which establish enhancements to applicable requirements of 40 C.F.R. Part 61, Subpart FF ("Benzene Waste

NESHAP" or "Subpart FF"), and which will minimize or eliminate fugitive benzene waste emissions at the Premcor Refineries.

A. **Compliance Status and Schedule**

124. Premcor shall comply with the compliance options specified below:

a. Premcor's Lima and Memphis Refineries shall comply with the compliance option set forth at 40 C.F.R. 61.342(e) (herein referred to as the "6 BQ Compliance Option"), to the extent that either refinery continues to have total annual benzene ("TAB") quantity ≥10 megagrams per year ("Mg/yr"). Upon completion of all corrective action identified in the plan submitted pursuant to Paragraph 134, the Lima and Memphis Refineries shall comply with the 6 BQ Compliance Option. Prior to completion of all corrective action identified in the plan submitted pursuant to Paragraph 134, the Lima and Memphis Refineries shall continue to operate current controls for purposes of complying with the 6 BQ Compliance Option.

b. Premcor's Port Arthur Refinery shall continue to comply with the compliance option set forth at 40 CFR 61.342(c), utilizing the exemptions set forth in 40 CFR 61.342(c)(2) and (c)(3)(ii) and the aggregation provisions set forth in 40 CFR 61.348(b) (hereinafter referred to as the "2 Mg Aggregate-and-Treat Compliance Option"), to the extent that it continues to have total annual benzene ("TAB") quantity ≥ 10 megagrams per year ("Mg/yr"). Upon completion of all corrective action identified in the plan submitted pursuant to Paragraph 134, the Port Arthur Refinery shall comply with the 2 Mg Aggregate-and-Treat Compliance Option. Prior to completion of all corrective action identified in the plan submitted pursuant to Paragraph 134, the Port Arthur Refinery shall continue to operate current controls for purposes of complying with the 2 Mg Aggregate-and-Treat Compliance Option.

124A. Premcor, in its sole discretion, may transition the Port Arthur Refinery from a 2Mg compliance option to the 6BQ Compliance Option in accordance with the provisions of this paragraph and Paragraph 125.

125. On or before the Date of Entry, if Premcor chooses to transition the Port Arthur Refinery, then Premcor shall provide written notice to EPA of Premcor's determination to transition the Port Arthur Refinery to the 6 BQ Compliance Option. Upon completion of all corrective action identified in the plan pursuant to Paragraph 134 for the Port Arthur Refinery, Premcor shall comply with all standards of Subpart FF that are applicable to facilities utilizing the 6 BQ Compliance Option, including the monitoring, recordkeeping and reporting requirements of 40 C.F.R. §§ 61.354, 61.356 and 61.357, respectively, as applicable to facilities utilizing the 6 BQ Compliance Option. Once converted, subparagraph 124(b) shall no longer apply.

B. Refinery Compliance Status Changes

126. Commencing on the Date of Entry of the Addendum and continuing through termination, Premcor shall not change the compliance status of the Lima or Memphis Refineries from the 6 BQ Compliance Option to a 2 Mg compliance option. Subsequent to achieving compliance with Paragraph 125, if applicable, Premcor shall not change the compliance status of the Port Arthur Refinery from the 6 BQ Compliance Option to a 2 Mg compliance option. Premcor shall consult with EPA and the appropriate Plaintiff-Intervener before making any change in compliance status not expressly prohibited by this Paragraph 126. Any such change must be undertaken in accordance with the regulatory provisions of the Benzene Waste NESHAP.

C. One-Time Review and Verification of Each Refinery's TAB and, as Applicable, Each Refinery's Compliance with the Appropriate Compliance Options

127. On or before June 30, 2008, if Premcor chooses to transition the Port Arthur Refinery, then Premcor shall complete a review and verification of the Refinery's TAB as specified in subparagraphs 128(a) – (d) for the Port Arthur Refinery to determine compliance with the 6 BQ Compliance Option. Premcor shall implement all actions necessary to ensure compliance with the 6

BQ Compliance Option at the Port Arthur Refinery in accordance with Paragraph 125. Notwithstanding any other provisions of this Addendum, if the Port Arthur Refinery is transitioned to the 6BQ Compliance Option, then it shall not be subject to the terms of this Part X applicable to refineries subject to the 6 BQ Compliance Option, nor shall it be subject to the terms of this Part X applicable to refineries subject to a 2 Mg compliance option, prior to Premcor's compliance with this paragraph. Except as set forth in this paragraph, the provisions of Paragraph 128 shall not apply to the Port Arthur Refinery.

128. Phase One of the Review and Verification Process. By no later than six months from the Date of Lodging, Premcor shall complete a review and verification of each Refinery's TAB to determine compliance with the applicable 2 Mg compliance option for the Port Arthur Refinery, to the extent that it is not transitioned to the 6 BQ Compliance Option, and to determine compliance with the 6BQ Compliance Option for the Lima and Memphis Refineries. For each such Refinery, the review and verification process shall include:

a. an identification of each waste stream that is required to be included in the Refinery's TAB (e.g., slop oil, tank water draws, spent caustic, desalter rag layer dumps, desalter vessel process sampling points, other sample wastes, maintenance wastes, and turnaround wastes);

b. a review and identification of the calculations and/or measurements used to determine the flows of each waste stream for the purpose of ensuring the accuracy of the annual waste quantity for each waste stream;

c. an analysis of the benzene concentration in each waste stream, using previous analytical data, documented knowledge of the waste streams or new analytical testing data in accordance with 40 C.F.R. § 61.355(c)(2); and

d. an identification of whether or not the stream is controlled consistent with the requirements of Subpart FF.

129. By no later than thirty (30) days following the completion of the review and verification process in Paragraphs 127 and 128, Premcor shall submit a Benzene Waste NESHAP Compliance Review and Verification Report ("BWN Compliance Review and Verification Report") that sets forth the results as identified in (a) through (d) of Paragraph 128. At its option, Premcor may submit one BWN Compliance Review and Verification Report that includes the results of all non-converted Refineries or may submit separate BWN Compliance Review and Verification Reports for each Refinery.

130. Phase Two of the Review and Verification Process. Based on EPA's review of the BWN Compliance Review and Verification Report(s), EPA may select up to twenty (20) waste streams at each Refinery for sampling for benzene concentration. Premcor will conduct the required sampling and submit the results to EPA within ninety (90) days of receipt of EPA's request. In the event that a stream for which EPA has required sampling is not available for sampling under normal operating conditions within a timeframe that would allow Premcor to satisfy such schedule, then Premcor shall submit sampling results for the subject refinery without the result for the unavailable stream in accordance with the foregoing schedule, and shall supplement the sampling report as soon as practicable after such sampling result becomes available under representative operating conditions.

131. Premcor will use the results of this sampling under Paragraph 130 to recalculate the TAB and the uncontrolled benzene quantity and to amend the relevant BWN Compliance Review and Verification Report, as needed. To the extent that EPA requires Premcor to sample a waste stream previously sampled, Premcor may average the results of all sampling events occurring after January 1, 2001. Premcor shall submit an amended BWN Compliance Review and Verification Report for the relevant Refinery, if necessary, within ninety (90) days following the date of the completion of the required Phase Two sampling, if Phase Two sampling is required by EPA.

D. Implementation of Corrective Actions

132. Amended TAB Reports. If the results of any BWN Compliance Review and Verification Report(s), indicate(s) that a Refinery's most recently-filed TAB report does not accurately reflect the TAB calculation for the Refinery, Premcor shall submit, by no later than sixty (60) days after completion of the BWN Compliance Review and Verification Report(s), an amended TAB report to the appropriate regulatory authority. The BWN Compliance Review and Verification Report(s) shall be deemed an amended TAB report for purposes of Subpart FF reporting to EPA.

133. Reserved.

134. Corrective Action. If the results of any BWN Compliance Review and Verification Report(s) indicate that Premcor is not in compliance with the applicable 2 Mg compliance option at the Port Arthur Refinery, to the extent that it is not converted to the 6 BQ Compliance Option, or the 6BQ Compliance Option at the Lima or Memphis Refineries or at the Port Arthur Refinery, to the extent converted to the 6 BQ Compliance Option, then Premcor shall submit to EPA, to the appropriate EPA Region, and to the appropriate Plaintiff-Intervener, by no later than sixty (60) days after completion of the BWN Compliance Review and Verification Report(s), a plan that identifies with specificity the compliance strategy and schedule that Premcor will implement to ensure that the subject Refinery complies with its applicable compliance option, or an alternative compliance option authorized under Subpart FF and Paragraph 126 as soon as practicable.

135. Review and Approval of Plans Any plans submitted pursuant to Paragraph 134 shall be subject to the approval of, disapproval of, or a request for modification by EPA, which shall act, after an opportunity for consultation with the appropriate Plaintiff-Intervener, consistent with the Benzene Waste NESHAP. Within sixty (60) days after receiving any notification of disapproval or request for modification from EPA, Premcor shall submit to EPA a revised plan that responds to all identified deficiencies. Upon receipt of approval from EPA, Premcor shall commence implementation of the plan according to the schedule approved in the plan. Disputes arising under this Paragraph 135 shall be resolved in accordance with the dispute resolution provisions of this Addendum. Within sixty (60)

days of completion of all requirements above, Premcor shall certify to EPA and the appropriate Plaintiff-Intervener that each Refinery is in compliance with the Benzene Waste NESHAP.

E. Carbon Canisters

136. For each of the Premcor Refineries that is subject to the 6 BQ or 2 Mg compliance options control requirements of the Benzene NESHAP, Premcor shall comply with the requirements of this Section X.E at all locations at such Refineries where a carbon canister(s) is utilized as a control device under the Benzene Waste NESHAP.

137. From the Date of Entry of the Addendum through termination of this Part, Premcor shall not use a single carbon canister for any new units or installations that require control pursuant to the Benzene Waste NESHAP at any Refineries subject to the 6 BQ or 2 Mg compliance options, unless it is technically infeasible or unsafe to use a dual carbon canister system or except as provided for in Paragraphs 138 and 139 for short term installations.

138. For existing carbon canister systems used to control emissions from installations that require control, Premcor shall complete installation of primary and secondary carbon canisters and operate them in series, by no later than 270 days after the Date of Entry of the Addendum. Notwithstanding any other provision of this Part X, Premcor may operate single canisters for short-term operations such as with temporary storage tanks. For all canisters operated for short-term operations as part of a single canister system, "breakthrough" is defined for the purposes of this Decree as any reading of VOCs above background. Beginning no later than the Date of Entry of this Addendum, Premcor shall monitor for breakthrough from a single carbon canister installation no less frequently than on a daily basis.

139. For locations where single canisters are utilized for short term operations, canisters will be replaced when breakthrough is determined within eight (8) hours for canisters with historical replacement intervals of two weeks or less or within twenty-four (24) hours for canisters with a historical replacement interval of more than two weeks. Single carbon canisters can be replaced with a

dual system (in series) at any time, provided single canister monitoring is continued until the second canister is installed.

140. By no later than ninety (90) days following the Date of Entry, Premcor shall submit to EPA a report concerning carbon canisters installed pursuant to Subpart FF at the Premcor Refineries. The report shall include the following information for each Refinery:

a. a list of all permanent locations within each Refinery where carbon canisters are installed;

b. the installation date of each secondary canister installed in accordance with Paragraph 138;

c. the date that each secondary canister installed in accordance with Paragraph 138 was put into operation;

d. the identity and location of each engineered carbon canister system, as hereinafter defined;

e. the capacity in pounds of carbon of each engineered carbon canister system; and

f. a list of and supporting justification for each instance in which a dual carbon canister system is not installed because of technical infeasibility or the creation of an unsafe condition at a location otherwise requiring a dual carbon canister system under Paragraph 137.

141. From the Date of Entry and through termination of the Addendum, "breakthrough" between the primary and secondary canister is defined as any reading equal to or greater than 100 ppm VOCs or 5 ppm benzene. In the event that Premcor elects to monitor for both VOCs and benzene pursuant to this provision, then "breakthrough" between the primary and secondary canister shall be defined only as a reading greater than 5 ppm benzene, provided that Premcor satisfies the following conditions:

a. Premcor shall collect and analyze the sample for benzene as soon as practical, and in no event later than 24 hours after obtaining the relevant VOC reading; and

b. Premcor shall conduct monitoring for benzene breakthrough between the primary and secondary carbon canisters for the subject dual carbon canister system until such time as it replaces the relevant primary carbon canister with the secondary carbon canister pursuant to Paragraph 143 according to the following schedule: (i) where the design carbon replacement interval for the unit is less than or equal to 30 days, Premcor shall monitor every operating weekday; (ii) where the design carbon replacement interval for the unit is 31 to 60 days, Premcor shall monitor at least twice a week; (iii) where the design carbon replacement interval for the unit is greater than sixty (60) days, Premcor shall monitor at least weekly.

142. By no later than seven (7) days after the Date of Entry of the Addendum (for existing dual canister systems), and by no later than seven (7) days after the installation of each new dual canister system, Premcor shall start to monitor for breakthrough between the primary and secondary carbon canisters at times when the source is connected to the carbon canister, and during periods of normal operation in accordance with the frequency specified in 40 C.F.R. § 61.354(d) (but in no event less frequently than once per month), or alternatively at least once on each operating weekday.

143. Premcor shall replace the original secondary carbon canister with a fresh carbon canister immediately when breakthrough between the primary and secondary canister is detected. The original secondary carbon canister will become the new primary carbon canister and the fresh carbon canister will become the secondary canister.

a. For carbon canisters not qualifying as engineered carbon canister systems pursuant to this paragraph, "immediately" shall mean within twenty-four (24) hours; provided, however, that if breakthrough is determined on a Saturday, Sunday, or holiday, then Premcor shall replace the original primary carbon canister by the end of the next regular work day if Premcor begins monitoring the secondary canister at least once per operating day until the primary canister is replaced.

b. For engineered carbon canister systems, "immediately" shall mean not more than fourteen (14) days if Premcor monitors the secondary canister at least once per operating day until the carbon in the primary canister is replaced and such monitoring of the secondary canister does not reveal "breakthrough", as defined in Paragraph 141. If breakthrough from the secondary canister is revealed, Premcor shall replace the secondary carbon canister within twenty-four hours of securing such monitoring results. For purposes of this Paragraph 143, "engineered carbon canister systems" shall mean carbon systems with fixed vessels for which each vessel has a capacity of carbon in excess of 5000 pounds.

c. In lieu of replacing a primary or secondary carbon canister pursuant to the terms of this paragraph, Premcor may elect to discontinue flow of benzene containing streams to the relevant carbon canister system until such canister is replaced.

144. Premcor shall maintain or otherwise provide for a reasonable supply of fresh carbon and carbon canisters at each of the Premcor Refineries.

145. Records to demonstrate compliance with the requirements of this Section X.E shall be maintained in accordance with 40 C.F.R. § 61.356(j)(10).

F. Annual Program

146. Premcor shall establish an annual program of reviewing process information for each of the Premcor Refineries, including but not limited to construction projects, to ensure that all new benzene waste streams are included in each Refinery's waste stream inventory. Premcor may fulfill this requirement by incorporating new benzene waste stream review into its existing "management of change" program.

G. Laboratory Audits

147. Premcor shall conduct audits, or secure results of audits conducted by parties other than the laboratories, of all laboratories that perform analyses of benzene waste NESHAP samples collected

at the Premcor Refineries to ensure that proper analytical and quality assurance/quality control procedures are followed.

148. By no later than one (1) year after the Date of Entry of the Addendum, Premcor shall conduct audits, or secure results of audits conducted by parties other than the laboratories, of the laboratories used by the Premcor Refineries. In addition, Premcor shall audit any new laboratory, or secure results of audits conducted by parties other than the new laboratory, used for analyses of benzene waste NESHAP samples prior to use of the new laboratory by a Refinery subject to this Addendum.

149. If Premcor has completed audits of any laboratory in the one year period prior to the Date of Entry of the Addendum, additional audits of those laboratories pursuant to Paragraph 148 shall not be required.

150. During the life of this Addendum, Premcor shall conduct subsequent laboratory audits, or secure results of audits conducted by parties other than the laboratories, as provided above, such that each laboratory serving each Premcor Refinery is audited every two (2) years.

151. As stated above, Premcor may retain third parties to conduct these audits or use audits conducted by others as its own, but the responsibility and obligation to ensure compliance with this Addendum and Subpart FF would remain with Premcor.

H. Benzene Spills

152. Premcor shall review all spills reportable under applicable federal and state standards that occur after the Date of Entry of this Addendum within each of the Premcor Refineries to determine if aqueous benzene waste was generated. To the extent required by the Benzene Waste NESHAP regulations and not already in the TAB, Premcor shall include benzene generated by such spills in the TAB. To the extent required by the Benzene Waste NESHAP regulations, Premcor shall include benzene generated by such spills in the uncontrolled benzene quantity calculations for each Refinery.

I. **Training**

153. By no later than one hundred twenty (120) days from the Date of Entry of the Addendum, Premcor shall develop an annual (i.e., once each calendar year) training program for employees asked to draw benzene waste samples at the Premcor Refineries.

154. For the Premcor Refineries complying with a 2 Mg compliance option or the 6 BQ Compliance Option, by no later than one hundred eighty (180) days from the Date of Entry of the Addendum, Premcor shall complete the development of standard operating procedures for all control equipment used to comply with the Benzene Waste NESHAP. By no later than two hundred seventy (270) days thereafter, Premcor shall complete an initial training program regarding these procedures for all operators assigned to this equipment. Comparable training shall also be provided to any persons who subsequently become operators, prior to their assumption of this duty. Until termination of this Decree, "refresher" training in these procedures shall be performed on at least a three year cycle.

155. Reserved.

156. If Premcor converts the Port Arthur Refinery to the 6BQ Compliance Option, then the Port Arthur Refinery shall comply with the provisions of Paragraph 154 by June 30, 2008.

157. As part of Premcor's training programs, Premcor must require any contractor hired to perform all or part of the requirements of this Part X to properly train its employees to implement the relevant provisions of this Part X.

J. **Waste/Slop/Off-Spec Oil Management**

158. For each of the Premcor Refineries subject to this Addendum, Premcor shall develop, similar to those in Appendix G in the Consent Decree, a schematic reflecting the movements of waste/slop/off-spec oil streams within each Refinery and shall provide this schematic to EPA on or before the June 30, 2007. Premcor will then certify to the best of its knowledge following reasonable inquiry, that these schematics accurately: depict the waste management units (including sewers) located at the Premcor Refineries upon the date of submittal under this paragraph that handle, store and

transfer waste/slop/off-spec oil streams; identify the control status of each waste management unit; and show how such oil is transferred within each Refinery. To the extent that Premcor and EPA determine that any change to a Refinery subject to this Addendum necessitates a revision to a schematic, then Premcor shall update such schematic.

159. Organic Benzene Waste Streams. Upon completion of all corrective action identified in the plan submitted pursuant to Paragraph 134, or in accordance with any compliance strategy approved by EPA pursuant to Paragraph 135, Premcor shall ensure that all waste management units handling "organic" benzene wastes, as defined in Subpart FF, shall meet any control standards applicable to such units under Subpart FF.

160. Aqueous Benzene Waste Streams. Except as otherwise provided by Subpart FF, for purposes of calculating the TAB at each of the Premcor Refineries pursuant to the requirements of 40 C.F.R. § 61.342(a), Premcor shall include all waste/slop/off-spec oil streams that become "aqueous" until such streams are recycled to a process or put into a process feed tank (unless the tank is used primarily for the storage of wastes). For purposes of complying with a 2 Mg or 6 BQ compliance option, to the extent required by Subpart FF, all waste management units handling aqueous benzene waste streams shall either meet the applicable control standards of Subpart FF or shall have their uncontrolled benzene quantity count toward the applicable 2 or 6 megagram limit.

161. Recordkeeping. For each of the Premcor Refineries, Premcor shall maintain records quantifying waste/slop/off-spec oil movements for all benzene waste streams.

162. Disputes under this Section X.J shall be resolved in accordance with the dispute resolution provisions of this Addendum.

K. End of Line Sampling

163. The provisions of this Section X.K shall apply to the Premcor Refineries from the Date of Entry through termination of this Part.

164. Valero developed and EPA approved representative end-of-line sampling ("EOL") plans, within Appendix G of the Consent Decree, designed to determine the benzene quantity in uncontrolled waste streams, including sampling locations and methods for flow calculations to be used in quarterly EOL benzene determinations. By June 30, 2007, Premcor shall develop and submit to EPA EOL Plans similar to the EOL plans submitted pursuant to the Consent Decree. EPA shall approve the EOL Plan for each Premcor Refinery provided such plans are consistent with the representative EOL Plans in Appendix G to the Consent Decree.

165. Commencing with the third calendar quarter 2007, Premcor shall conduct quarterly EOL sampling for benzene quantities in uncontrolled waste streams at the Premcor Refineries according to each proposed and/or approved EOL Plan.

166. Once an EOL Plan is approved by EPA, if changes in processes, operations, or other factors cause the approved sampling locations and approved methods for determining flow calculations to no longer provide an accurate measure of a Refinery's EOL benzene quantity, Premcor shall submit a revised EOL Plan to EPA for approval. Any changes to a EOL Plan made by Premcor prior to EPA approval of the original Plan shall be submitted as a revised proposed Plan and may be implemented thereafter.

167. Premcor shall use all sampling results and approved flow calculation methods under the approved sampling plans referenced in Paragraph 164 to calculate a quarterly and estimate a calendar year value for each of the Premcor Refineries. If the quarterly calculation for a refinery made pursuant to this paragraph exceeds (a) 2.5 Mg for a refinery with TAB historically less than 10 Mg/yr, (b) 0.5 Mg for a refinery complying with a 2 Mg compliance option, or (c) 1.5 Mg for a refinery complying with the 6 BQ Compliance Option, but Premcor estimates that the annual benzene quantity for such refinery will remain below the referenced annual quantity, then Premcor shall include within its next report under Paragraphs 176 or 178 comments justifying why, notwithstanding the quarterly

calculation, Premcor estimates that the annual benzene quantity will not exceed the applicable level listed above.

168. If any estimated annual benzene calculation for any facility made pursuant to the proceeding paragraph exceeds (a) 2 Mg for a refinery complying with a 2 Mg compliance option, or (b) 6 Mg for a refinery complying with the 6 BQ Compliance Option, then Premcor shall prepare for each such refinery a written summary and schedule of the activities planned to minimize benzene waste at such refinery to ensure that it complies with the Benzene Waste Operations NESHAP. (The estimated annual values in and of themselves, are not the basis for penalties and are not deemed to be instances of non-compliance for purpose of this Addendum.) The summary and schedule are due no later than sixty (60) days after the close of the quarter in which the estimated annual value exceeds the applicable quantity (the "TAB Study and Compliance Review").

169. Reserved.

170. Premcor shall maintain records supporting its quarterly calculations of EOL quantities, including the methodology and data used to identify and calculate flow until termination of the obligations of this Part.

L. Miscellaneous Measures

171. For the Premcor Refineries that have a TAB greater than 10 Mg/yr, Premcor shall manage all groundwater remediation conveyance systems in accordance with, and to the extent required by, the Benzene Waste NESHAP, 40 C.F.R. § 61.342. In accordance with 40 C.F.R. § 61.342, Premcor may exclude from the calculation of a Refinery's TAB the benzene concentration in any waste generated by remediation activities conducted at such Refinery.

172. From the first calendar quarter commencing after the Date of Entry through termination of the Addendum, each Premcor Refinery subject to this Addendum shall:

a. Conduct monthly visual inspections of all water traps within the Refinery's individual drain systems that are controlled under the Benzene Waste NESHAP;

b. Identify and mark all area drains that are segregated stormwater drains;

c. Where installed pursuant to Subpart FF, visually monitor all conservation vents or indicators on process sewers for detectable leaks on a weekly basis and reset any vents where leaks are detected. After two (2) years of weekly inspections, and based upon an evaluation of the recorded results, Premcor may submit a request to the appropriate EPA Region to modify the frequency of the inspections. EPA shall not unreasonably withhold its consent. Nothing in this subparagraph shall require Premcor to monitor conservation vents on fixed roof tanks; and

d. Conduct quarterly monitoring, in accordance with the "no detectable emissions" provision in 40 C.F.R. § 61.347, of oil-water separators controlled in accordance with 40 C.F.R. § 61.347.

173. Reserved.

174. Notwithstanding any other provision in this Addendum or its required sampling, Premcor shall account for and include in the TAB all slop oil recovered from its oil/water separators or sewer systems until recycled or put into a feed tank in accordance with, and only to the extent required by 40 C.F.R. § 61.342(a). In no event shall the benzene content in slop oil be counted more than once towards a facility's TAB calculation.

M. Recordkeeping and Reporting Requirements for this Part

175. In addition to the Reports Required under 40 C.F.R. § 61.357. At the times specified in the applicable provisions of this part, Premcor shall submit for the Premcor Refineries the following reports to EPA, to the applicable EPA Region, and to the applicable Plaintiff-Intervener:

a. BWN Compliance Review and Verification Report (¶129), as amended, if necessary (¶131);

b. Amended TAB Report, if necessary (¶132);

c. Plan(s) to comply with Subpart FF, if any BWN Compliance Review and Verification Reports, indicate non-compliance (¶134);

d. Report concerning carbon canister systems (¶140); and

e. TAB Study and Compliance Review, if necessary (¶168).

176. In Conjunction with the Reports Required under 40 C.F.R. § 61.357 For each Refinery for which Premcor is required, pursuant to 40 C.F.R. §§ 61.357(d)(6) and (7), to submit quarterly reports ("Section 61.357 Reports"), Premcor shall include the following additional information in the subject Section 61.357 Reports for such Refinery:

i. Laboratory Audits. Once laboratory audits are required to have been conducted pursuant to the provisions of Section X.G., Premcor shall identify, in each Section 61.357 Report submitted thereafter until termination of this Addendum, all laboratory audits completed for such Refinery pursuant to the provisions of Section X.G during the calendar quarter for which the quarterly report is due. Premcor shall include the identification of each laboratory audited, a description of the methods used in the audit, and a summary of the results of the audit.

ii. Training. Once Premcor is required to have conducted training at its Refinery pursuant to Section X.I., Premcor shall describe, in each Section 61.357 Report submitted thereafter until termination of this Addendum, the measures that it took to comply with the training provisions of Section X.I for such Refinery, starting from the Date of Entry of the Addendum;

iii. EOL Sampling Results. Once EOL sampling is required under Section X.K, Premcor shall report the results of the quarterly EOL sampling undertaken at such Refinery pursuant to Section X.K for the calendar quarter. The report shall include a list of all waste streams sampled at such Refinery, the results of the benzene analysis for each sample, the computation of the EOL benzene quantity for the quarter and any other related information required by any plan approved for such Refinery pursuant to Paragraph 164.

177. Reserved.

178. For each Refinery for which Premcor determines a TAB level of less than 10 mg/yr (and for which Premcor is not required to submit a Section 61.357 Report), Premcor shall submit a progress report as part of the report required by Part XVI. For each semi-annual period, Premcor shall submit for such Refinery the information described in Paragraphs 176(i)-(ii), and the following information:

i. The results of the quarterly EOL sampling undertaken pursuant to Paragraphs 164 - 167.

ii. A list of all waste streams sampled, the results of the benzene analysis for each sample, and the computation of the EOL benzene quantity for the respective quarters.

iii. An identification, for each Refinery, of whether the quarterly benzene quantity equals or exceeds 2.5 Mg/yr and whether the projected calendar year benzene quantity equals or exceeds 10 Mg/yr. If either condition is met, Premcor shall include in the Progress Report a plan or determination, if required pursuant to Paragraphs 167 and 168.

179. – 180. Reserved.

N. **Agencies to Receive Reports, Plans and Certifications Required in the paragraph; Number of Copies**

181. Unless otherwise specified in this Part, Premcor shall submit all reports, plans and certifications required to be submitted under this Part X to EPA, the appropriate EPA Region and the applicable Plaintiff-Intervener. For each submission, Premcor shall submit two copies to EPA, two copies to the appropriate EPA Region and two copies to the appropriate Plaintiff-Intervener. By agreement between Premcor and each of the offices that are to receive the materials in this Part X, Premcor may submit the materials electronically.

XI. LEAK DETECTION AND REPAIR ("LDAR") PROGRAM ENHANCEMENTS

Program Summary: Premcor shall undertake at each Premcor Refinery the following measures to enhance each Refinery's LDAR program and minimize or eliminate fugitive emissions from valves and pumps in light liquid and/or in gas/vapor service.

A. Introduction

182. In order to minimize or eliminate fugitive emissions of volatile organic compounds ("VOCs"), benzene, volatile hazardous air pollutants ("VHAPs"), and organic hazardous air pollutants ("HAPs") from valves and pumps in light liquid and/or in gas/vapor service, Premcor shall undertake at each of the Premcor Refineries the enhancements of this Part XI to each Refinery's LDAR program under Title 40 of the Code of Federal Regulations, Part 60, Subparts VV and GGG; Part 61, Subparts J and V; Part 63, Subparts F, H, and CC; and applicable state and local LDAR requirements that are federally enforceable or implemented by participating Plaintiff-Interveners (collectively, the "LDAR Regulations"). The terms "in light liquid service" and "in gas/vapor service" shall have the definitions set forth in the applicable provisions of the LDAR Regulations.

183. Reserved.

184. For purposes of this Part XI, "Equipment" shall mean pumps and valves in light liquid or gaseous service at the refineries subject to this Addendum, except for those pumps and valves exempt from standard monitoring frequencies under applicable LDAR Regulations.

B. Written Refinery-Wide LDAR Program

185. By no later than June 30, 2007, Premcor shall develop and maintain, for each Premcor Refinery, a written, Refinery-wide program for compliance by such Refinery with applicable LDAR Regulations. Until termination of this Decree, Premcor shall implement these programs at each Premcor Refinery on a Refinery-wide basis, and shall update each refinery's program as necessary to ensure continuing compliance. Each Refinery-wide program shall include:

1. An overall, Refinery-wide leak rate goal that will be a target for achievement on a process-unit-by-process-unit basis. For purposes of this provision, the overall

Refinery-wide leak rate goal shall constitute a tool for implementation of the Refinery-wide program, but shall not be enforceable or subject to stipulated penalties under Part XX;

2. Identification of all Equipment that has the potential to leak VOCs, HAPs, VHAPs, and benzene within process units that are owned and maintained by each Refinery;

3. Procedures for identifying leaking Equipment within process units that are owned and maintained by each Refinery;

4. Procedures for repairing and keeping track of leaking Equipment;

5. Procedures for identifying and including in the LDAR program new Equipment; and

6. A process for evaluating new and replacement Equipment to promote consideration and installation of equipment that will minimize leaks and/or eliminate chronic leakers.

C. **Training**

186. By no later than June 30, 2007, Premcor shall implement the following training programs at each of the Refineries:

1. For personnel newly-assigned to LDAR responsibilities, require LDAR training prior to each employee beginning such work;

2. For all personnel with assigned LDAR responsibilities, provide and require completion of annual LDAR training; and

3. For all other Refinery operations and maintenance personnel (including contract personnel), provide and commence implementation of an initial training program, with completion within six (6) months thereafter, that includes

instruction on aspects of LDAR if and to the extent that aspects of LDAR are relevant to the person's duties.

4. Until termination of this Decree, perform "refresher" training in LDAR on a three year cycle.

D. LDAR Audits

187. Premcor shall undertake at each of the Premcor Refineries the Refinery-wide audits set forth in Paragraphs 188 and 189, to help ensure each Refinery's compliance with all applicable LDAR requirements. Premcor's LDAR audits shall include comparative monitoring of valves and pumps, records review to ensure monitoring and repairs for valves and pumps were completed as required, tagging review, data management review, and observation of the LDAR technicians' calibration and monitoring techniques.

188. Third-Party Audits. Premcor shall conduct a third-party audit of each Refinery's LDAR program at least once every four years. For purposes of this requirement, "third party" may include a qualified contractor, consultant, industry group, or trade association. The first third-party audit shall be completed no later than one year from the Date of Entry of the Addendum. During the period between the Date of Entry and the date of the first audit for each refinery under this Section, Premcor shall make reasonable efforts to ensure compliance with the requirements of this Addendum and all applicable LDAR regulations.

189. Internal Audits. Premcor shall conduct internal audits of each of the Premcor Refineries' LDAR programs by sending Premcor or Valero personnel familiar with the LDAR program and its requirements to audit a Premcor Refinery. Premcor shall complete the first round of these internal LDAR audits by no later than two years from the date of completion of the first round of third-party audits required in Paragraph 188. Internal audits of each Refinery shall be held every four years thereafter for the life of this Addendum.

190. Frequency. To ensure that an audit at each Refinery subject to this Addendum occurs every two years, third-party and internal audits shall be separated by approximately two years after the initial Third Party Audit.

191. Alternative. As an alternative to the internal audits required by Paragraph 189, Premcor may elect to retain third-parties to undertake one or more of these audits, provided that an audit of each Refinery occurs every two (2) years.

E. Implementation of Actions Necessary to Correct Non-Compliance

192. If the results of any of the audits conducted pursuant to Section XI.D at any of the Premcor Refineries identify any areas of non-compliance with the LDAR Regulations, Premcor shall implement, as soon as practicable, all appropriate steps necessary to correct the area(s) of non-compliance, and to prevent, to the extent practicable, a recurrence of the cause(s) of the non-compliance. In the Semiannual LDAR Report submitted pursuant to the provisions of Section XI.R covering the period when an audit was conducted, Premcor shall certify to EPA that the audit has been completed and that the refinery is in compliance or on a compliance schedule.

F. Retention of Audit Reports

193. Until termination of the Addendum, Premcor shall retain the audit reports generated pursuant to Section XI.D and shall maintain a written record of the corrective actions taken at each of its Refineries in response to any deficiencies identified in any audits. In the Semiannual LDAR Report submitted pursuant to the provisions of Section XI.R covering the period when an audit was conducted pursuant to Section XI.D, Premcor shall submit the audit reports and corrective action records for audits performed and actions taken during the previous semiannual period.

G. Internal Leak Definition for Valves and Pumps

194. Premcor shall utilize the following internal leak definitions for Equipment covered by an applicable LDAR program at the Premcor Refineries, unless a lower leak definition is established for the relevant Refinery under applicable permit(s) or applicable state LDAR Regulations.

195. Leak Definition for Valves. Two years from the Date of Entry, Premcor shall utilize an internal leak definition of 500 ppm VOCs for refinery valves qualifying as Equipment at the Lima and Memphis Refineries. At the Date of Entry of the Addendum, the Port Arthur Refinery shall utilize an internal leak definition of 500 ppm VOCs for refinery valves qualifying as Equipment.

196. Leak Definition for Pumps. Two years from the Date of Entry, Premcor shall utilize an internal leak definition of 2000 ppm for refinery pumps qualifying as Equipment at the Memphis and

Lima Refineries. At the Date of Entry, the Port Arthur Refinery shall utilize an internal leak definition of 2000 ppm for refinery pumps qualifying as Equipment.

H. Reporting, Recording, Tracking, Repairing and Remonitoring Leaks of Valves and Pumps Based on the Internal Leak Definitions

197. Reporting. For regulatory reporting purposes, Premcor may continue to report leak rates in valves and pumps against the applicable regulatory leak definition, or may use the lower, internal leak definitions specified in Paragraphs 195 and/or 196.

198. Recording, Tracking, Repairing and Remonitoring Leaks. Premcor shall record, track, repair and remonitor all leaks in excess of the internal leak definitions of Paragraphs 195 and 196 (at such time as those definitions become applicable) in accordance with applicable provisions of the LDAR Regulations, except that Premcor shall have five (5) days to make an initial attempt at repair and thirty (30) days either to make final repairs and remonitor leaks that are greater than the internal leak definitions but less than the applicable regulatory leak definitions or to place the valve on the delay of repair list according to Section XI.Q.

I. Initial Attempt at Repair on Valves

199. Beginning no later than ninety (90) days after the Date of Entry of this Addendum, Premcor shall make an "initial attempt" at repair on any valve qualifying as Equipment under Paragraph 184 that has a reading greater than 200 ppm of VOCs, for the life of the Addendum, excluding control valves, orbit valves and other valves that LDAR personnel are not authorized to repair. Premcor or its designated contractor, as applicable, shall make this "initial attempt" and remonitor such valves within five (5) calendar days of identification. Unless the remonitored leak rate is greater than the applicable leak definition, no further action will be necessary.

J. LDAR Monitoring Frequency

200. Pumps. When the lower leak definition for pumps becomes applicable pursuant to Paragraph 196, Premcor shall monitor pumps qualifying as Equipment at the lower leak definition on a monthly basis.

201. Valves. When the lower leak definition for valves becomes applicable pursuant to Paragraph 195, Premcor shall monitor valves qualifying as Equipment in accordance with one of the following options on a process unit-by-process unit basis:

a. Quarterly monitoring with no ability to skip periods. This option cannot be chosen for process units subject to the HON or the modified-HON option in the Refinery MACT; or

b. Sustainable skip period program (see attached Appendix I). Previous process unit monitoring results may be used to determine the initial skip period interval provided that each valve has been monitored using the 500 ppm leak definition. Process units monitored in the skip period alternative method may not revert to quarterly monitoring if the most recent monitoring period demonstrates that more than two percent of the valves were found leaking under the internal leak definition.

202. Reserved.

203. For process units complying with the sustainable skip period program set forth in Paragraph 201(b), EPA or the relevant state Intervener agency may require Premcor to implement more frequent monitoring of valves qualifying as Equipment, in accordance with the monitoring frequencies specified in the skip period provisions identified in Appendix I, if the leak rate determined during an EPA or relevant Plaintiff-Intervener inspection demonstrates that more frequent monitoring is appropriate. In evaluating whether the leak rate demonstrates that more frequent monitoring of valves is appropriate, EPA or the relevant Plaintiff-Intervener, as applicable, will determine the leak rate utilizing data generated in accordance with 40 C.F.R. Part 60, EPA Reference Test Method 21, and based on the total number of valves in the process unit, rather than the total number of valves monitored during the inspection.

204. Premcor shall have the option of monitoring affected valves and pumps within process units after completing a documented maintenance, startup or shutdown activity without having the

results of the monitoring count as a scheduled monitoring activity, provided that Premcor monitors according to the following schedule:

a. Event involving 1,000 or fewer affected valves and pumps – monitor within one (1) week of the documented maintenance, startup or shutdown activity;

b. Event involving greater than 1,000 but fewer than 5,000 affected valves and pumps – monitor within two (2) weeks of the documented maintenance, startup or shutdown activity; and

c. Event involving greater than 5,000 affected valves and pumps – monitor within four (4) weeks of the documented maintenance, startup or shutdown activity.

K. Electronic Monitoring, Storing, and Reporting of LDAR Data

205. Electronic Storing and Reporting of LDAR Data. For each of the Premcor Refineries, Premcor has and will continue to maintain an electronic database for storing and reporting LDAR data.

206. Electronic Data Collection During LDAR Monitoring. By no later than June 30, 2007, Premcor shall use dataloggers and/or electronic data collection devices during all LDAR monitoring required by this decree. Premcor, or its third party contractor(s), shall use its best efforts to transfer, on a daily basis, electronic data from electronic datalogging devices to the electronic database required pursuant to Paragraph 205. For all monitoring events in which an electronic data collection device is used, the collected monitoring data shall include a time and date stamp, operator identification, and instrument identification. Premcor may use paper logs where necessary or more feasible (e.g., small rounds, remonitoring, or when dataloggers are not available or broken), and shall record the identification of the technician undertaking the monitoring, the date, time, and the identification of the monitoring equipment. Premcor shall transfer any manually recorded monitoring data to the electronic database within seven (7) days of monitoring.

L. **QA/QC of LDAR Data**

207. By no later than ninety (90) days after the Date of Entry of this Addendum, Premcor or its third party contractor(s) shall develop and implement a procedure to ensure a quality assurance/quality control ("QA/QC") review of all data generated by LDAR monitoring technicians. This QA/QC procedure shall include procedures for:

1. Monitoring technician(s) reviewing the monitoring data daily;
2. Quarterly performing a QA/QC review of Premcor's and any third party contractor's monitoring data which shall include, but not be limited to: number of components monitored per technician, time between monitoring events, and abnormal data patterns.

M. **LDAR Personnel**

208. By no later than the Date of Entry of the Addendum, Premcor shall establish a program for the Premcor Refineries that will hold LDAR personnel accountable for LDAR performance at each Refinery. Premcor shall maintain a position within each Refinery with responsibility for LDAR management and with the authority to implement improvements.

N. **Adding New Valves and Pumps**

209. By no later than one (1) year from the Date of Entry, Premcor shall establish a tracking program for maintenance records (e.g., a Management of Change program) to ensure that valves and pumps qualifying as Equipment added to each Refinery during maintenance and construction are integrated into the LDAR program.

O. **Calibration/Calibration Drift Assessment**

210. Calibration. Premcor shall conduct all calibrations of LDAR monitoring equipment using methane as the calibration gas, in accordance with 40 C.F.R. Part 60, EPA Reference Test Method 21.

211. Calibration Drift Assessment. Beginning no later than sixty (60) days from the Date of Entry of this Addendum, Premcor shall conduct calibration drift assessments of LDAR monitoring equipment at the end of each monitoring shift, at a minimum. Premcor shall conduct the calibration drift assessment using, at a minimum, a 500 ppm calibration gas. If any calibration drift assessment after the initial calibration shows a negative drift of more than 10% from the previous calibration, Premcor shall remonitor all valves at such Refinery qualifying as Equipment that were monitored since the last calibration and that had a reading greater than 100 ppm and all pumps at such Refinery qualifying as Equipment that were monitored since the last calibration and that had a reading greater than 500 ppm.

P. Chronic Leakers

212. Premcor shall replace, repack, or perform similarly effective repairs on chronically leaking, non-control valves during the next process unit turnaround after identification. A component shall be classified as a "chronic leaker" under this paragraph if it leaks above 10,000 ppm twice in any consecutive four quarters, unless the component had not leaked in the twelve (12) consecutive quarters immediately prior to the relevant process unit turnaround.

Q. Delay of Repair

213. Beginning no later than sixty (60) days from the Date of Entry of the Addendum, for any valves or pumps qualifying as Equipment for which Premcor is allowed under the applicable LDAR Regulations to place on the "delay of repair" list, Premcor shall satisfy the following requirements. Nothing in this provision is intended to limit Premcor's ability to isolate a valve or pump rather than placing it on the "delay of repair" list, to the extent authorized under applicable LDAR Regulations.

a. For all valves or pumps:

i. Require sign-off by the unit supervisor that the valve or pump is technically infeasible to repair without a process unit shutdown, to the

extent that the valve or pump is being placed on the "delay of repair" list for that reason; and

2. Include valves and pumps that are placed on the "delay of repair" list in regular LDAR monitoring.

b. For valves: For valves, other than control valves, qualifying as Equipment leaking at a rate of 10,000 ppm or greater, require use of a "drill and tap" or equivalent method for fixing such leaking valves, rather than placing the valve on the "delay of repair" list, unless Premcor can demonstrate that there is a safety, mechanical, or adverse environmental concern posed by attempting to repair the leak in this manner. Premcor shall perform the first "drill and tap" (or equivalent repair method) within fifteen (15) days, and a second attempt (if necessary) within thirty (30) days after the leak is detected. After two unsuccessful attempts to repair a leaking valve through the drill and tap method, Premcor may place the leaking valve on its "delay of repair" list. If a new method develops for repairing such valves, Premcor will advise EPA prior to implementing the use of such new method in place of drill and tap for repairs required under this Addendum.

R. Recordkeeping and Reporting Requirements for this Part

214. In addition to the Reports Required under 40 C.F.R. § 60.487 and § 63.654.

a. Written Refinery-Wide LDAR Program. No later than July 31, 2007, Premcor shall submit a copy of each of the Premcor Refineries' Written Refinery-Wide LDAR Programs developed pursuant to Paragraph 185 to EPA, the appropriate EPA Region, and the appropriate Plaintiff-Intervener agency.

b. Certification of Use of Electronic Data Collection during LDAR Monitoring. No later than July 31, 2007, Premcor shall certify that it utilizes at all of the Premcor Refineries

electronic data collection devices during LDAR monitoring, pursuant to the requirements of Paragraph 206.

215. As part of the Reports Required under 40 C.F.R. § 60.487 and § 63.654 (Semi-Annual LDAR Report) Premcor shall submit, for the Premcor Refineries, the following information, at the following times:

a. First Semiannual LDAR Report Due under the Addendum. Premcor shall include the following as part of its report(s), as applicable:

i. A certification of the implementation of the "initial attempt at repair" program of Paragraph 199;

ii. A certification of the implementation of QA/QC procedures for review of data generated by LDAR technicians as required by Paragraph 207;

iii. An identification of the individual, by name or title, at each Refinery responsible for LDAR performance as required by Paragraph 208;

iv. A certification of the development of a tracking program for new valves and pumps added during maintenance and construction (Management of Change Program) as required by Paragraph 209;

v. A certification of the implementation of the calibration and calibration drift assessment procedures of Paragraphs 210 and 211;

vi. A certification of the implementation of the "chronic leaker" and "delay of repair" procedures of Paragraphs 212 and 213; and

vii. A copy of each refinery's written refinery-wide LDAR program under Paragraph 185.

b. Until termination of this Part XI of the Addendum, Premcor shall include the following information in the Semiannual LDAR Reports:

i. An identification of each audit, if any, that was conducted pursuant to the requirements of Section XI.D. in the previous semiannual period at each of the Premcor Refineries. For each audit identified, the report shall include an identification of the auditors, a summary of the audit results, and a summary of the actions that Premcor took or intends to take to correct all deficiencies identified in the audits.

ii. Training. Information identifying the measures taken to comply with the provisions of Paragraph 186; and

iii. Monitoring. The following information on LDAR monitoring:

(a) a list of the process units monitored during the reporting period;

(b) the number of valves and pumps present in each monitored process unit;

(c) the number of valves and pumps monitored in each process unit;

(d) the number of valves and pumps found leaking;

(e) the number of "difficult to monitor" pieces of equipment monitored;

(f) the projected month of the next monitoring event for that unit;

(g) a list of all pumps and valves currently on the "delay of repair" list, the date each component was placed on the list, the date each such component was determined to be leaking at a rate greater than 10,000 ppm, the date each drill and tap or equivalent method of repair, its associated monitoring results and whether such activities were completed in a timely manner under Paragraph 213;

(h) a list of all initial attempts/remonitoring that did not occur in a timely manner under Paragraph 199;

(i) the number of missed or untimely repairs under Paragraph 198; and

(j) the number of missed or untimely repairs under Paragraphs 212 and 213.

S. **Agencies to Receive Reports, Plans and Certification Required in this Part XI: Number of Copies**

216. Reserved.

217. Unless otherwise specified in this Part XI, Premcor shall submit all reports, plans and certifications required to be submitted under this Part XI to EPA and to the appropriate EPA Region and Plaintiff-Intervener. For each submission, Premcor shall submit one copy to EPA, two copies to the appropriate EPA Region and two copies to the appropriate Plaintiff-Intervener. By agreement between Premcor and each of the offices that are to receive the materials in this Part XI, Premcor may submit the materials electronically.

T. **Excluded Equipment**.

218. Notwithstanding anything to the contrary in this Part XI, the LDAR program shall not apply to valves and pumps exempt under the LDAR Regulations, including but not limited to: pressure relief devices, valves on closed vent systems, valves in vacuum service, leakless valves, and pumps with no mechanism to leak (e.g. canned and mag pumps). In addition, nothing in this Addendum is intended to require Premcor to monitor difficult-to-monitor valves or unsafe-to-monitor valves more frequently than is otherwise required under the LDAR Regulations.

U. **New Monitoring Technologies**.

219. In the event that EPA adopts new monitoring technologies (such as infrared imaging) into its LDAR regulations in the future, Premcor may request a modification to this Part XI to take advantage of such new regulations. EPA, after an opportunity for consultation with appropriate

Plaintiff-Interveners, may approve a change to part or all of this Part XI to take advantage of the new leak detection technology. Such a revised protocol must be developed and mutually agreed upon in writing by EPA and Premcor in accordance with Paragraph 381 [Modification].

XII. PROGRAM ENHANCEMENTS RE: NSPS SUBPARTS A AND J SO_2 EMISSIONS FROM CLAUS SULFUR RECOVERY PLANTS ("SRP") AND FLARING

Program Summary: Beginning immediately upon the lodging of this Addendum, Premcor agrees to take the following measures at all of its SRPs and certain flaring devices at the Premcor Refineries. Premcor will install additional equipment at certain refineries to achieve additional SO_2 emission reductions and further reduce flaring incidents. Premcor will implement procedures for root cause analysis of acid gas and hydrocarbon flaring incidents and tail gas incidents at all refineries.

A. DEFINITIONS

220. Unless otherwise expressly provided herein, terms used in this Part shall be interpreted as defined in the Clean Air Act, 42 U.S.C. § 7401 et seq., and the applicable regulations promulgated thereunder. In addition, the following definitions shall apply, for purposes of this Addendum, to the terms contained within this Part of this Addendum:

(1) "Acid Gas" (AG) shall mean any gas that contains hydrogen sulfide and is generated at a refinery by the regeneration of an amine scrubber solution;

(2) "AG Flaring" shall mean, for purposes of this Addendum, the combustion of Acid Gas and/or Sour Water Stripper Gas in an AG Flaring Device. Nothing in this definition shall be construed to modify, limit, or affect EPA's authority to regulate the flaring of gases that do not fall within the definitions contained in this Addendum of Acid Gas or Sour Water Stripper Gas.

(3) "AG Flaring Device" shall mean any device at a refinery that is used for the purpose of combusting Acid Gas and/or Sour Water Stripper Gas, except facilities in which gases are combusted to produce elemental sulfur, sulfuric acid or ammonium thiosulfate. The combustion of Acid Gas and/or Sour Water Stripper Gas occurs in AG Flaring Devices identified in Appendix K. To the extent that the refinery utilizes AG Flaring Devices

other than those identified in Appendix K for purposes of combusting Acid Gas and/or Sour Water Stripper Gas, those Flaring Devices shall be considered AG Flaring Devices under this Addendum.

(4) "AG Flaring Incident" shall mean the continuous or intermittent flaring/combustion of Acid Gas and/or Sour Water Stripper Gas in an AG Flaring Device that results in the emission of sulfur dioxide equal to, or greater than five hundred (500) pounds in a twenty-four (24) hour period; provided, however, that if five hundred (500) pounds or more of sulfur dioxide have been emitted in a twenty-four (24) hour period and flaring continues into subsequent, contiguous, non-overlapping twenty-four (24) hour period(s), each period of which results in emissions equal to, or in excess of five hundred (500) pounds of sulfur dioxide, then only one AG Flaring Incident shall have occurred. Subsequent, contiguous, non-overlapping periods are measured from the initial commencement of flaring within the AG Flaring Incident.

(5) "Day" shall mean a calendar day.

(6) "Hydrocarbon Flaring" shall mean, for purposes of this Addendum, the flaring of refinery hydrocarbon process gases, except for Acid Gas and/or Sour Water Stripper Gas and/or Tail Gas, in a Hydrocarbon Flaring Device. Nothing in this definition shall be construed to modify, limit, or affect EPA's authority to regulate the flaring of gases that do not fall within the definitions contained in this Addendum.

(7) "Hydrocarbon Flaring Device" shall mean a flare device listed in Appendix N. Premcor shall provide notice to EPA, within the next report to be submitted pursuant to Part XVI, of any new Hydrocarbon Flaring Device which is installed at a Premcor Refinery subsequent to the Date of Entry of this Addendum. To the extent that a Premcor Refinery utilizes a Hydrocarbon Flaring Device other than those specified in Appendix N for the purposes of combusting any excess of a refinery-generated gas other than

Acid Gas and/or Sour Water Stripper Gas, such Hydrocarbon Flaring Device shall be covered under this Addendum.

(8) "Hydrocarbon Flaring Incident" or HC Flaring Incident, shall mean continuous or intermittent Hydrocarbon Flaring, at a Hydrocarbon Flaring Device that results in the emission of sulfur dioxide equal to, or greater than five hundred (500) pounds in a 24-hour period; provided, however, that if five hundred (500) pounds or more of sulfur dioxide have been emitted in a twenty-four (24) hour period and flaring continues into subsequent, contiguous, non-overlapping twenty-four (24) hour period(s), each period of which results in emissions equal to, or in excess of five-hundred (500) pounds of sulfur dioxide, then only one HC Flaring Incident shall have occurred. Subsequent, contiguous, non-overlapping periods are measured from the initial commencement of Flaring within the HC Flaring Incident.

(9) "Malfunction" shall mean any sudden, infrequent, and not reasonably preventable failure of air pollution control equipment, process equipment, or a process to operate in a normal or usual manner. Failures that are caused in part by poor maintenance or careless operation are not malfunctions.

(10) "Root Cause" shall mean the primary cause or causes of a AG or HC Flaring Incident or of a Tail Gas Incident as determined through a process of investigation.

(11) "Scheduled Maintenance" of an SRP shall mean any shutdown of an SRP that Premcor schedules at least fourteen (14) days in advance of the shutdown for the purpose of undertaking maintenance of that SRP.

(12) "Shutdown" shall mean the cessation of operation of an affected facility for any purpose.

(13) "Sour Water Stripper Gas" or "SWS Gas" shall mean the gas produced by the process of stripping or scrubbing refinery sour water.

(14) "Startup" shall mean the setting in operation of an affected facility for any purpose.

(15) "Sulfur Recovery Plant" or "SRP" shall mean a process unit that recovers sulfur from hydrogen sulfide by a vapor phase catalytic reaction of sulfur dioxide and hydrogen sulfide.

(16) "Tail Gas" shall mean exhaust gas from the Claus trains and the tail gas treating unit ("TGTU") section of the SRP.

(17) "Tail Gas Incident" shall mean the combustion of Tail Gas that:

a. is combusted in a flare that results in five hundred (500) pounds of sulfur dioxide emissions in a twenty-four (24) hour period; or

b. is combusted in a thermal incinerator and results in excess emissions of 500 pounds or more of SO_2 in any 24-hour period. Only those time periods which are in excess of a SO_2 concentration of 250 ppm (rolling 12-hour average) shall be used to determine the amount of excess SO_2 emissions from the incinerator; provided, however, that during periods of maintenance of a monitored incinerator, a Tail Gas Incident shall mean the combustion of Tail Gas in a combustion device other than a monitored incinerator where the amount of sulfur dioxide emissions in excess of 250 ppm on a twenty-four (24) hour period exceeds five hundred (500) pounds, calculated based upon best engineering judgment.

c. Reserved

(18) "Upstream Process Units" shall mean all amine contactors, amine scrubbers, and sour water strippers at the refinery, as well as all process units at the refinery that produce gaseous or aqueous waste streams that are processed at amine contactors, amine scrubbers, or sour water strippers.

(19) "Flaring Device" shall mean an Acid Gas Flaring Device and/or Hydrocarbon Flaring Device.

B. SRP NSPS Subparts A And J Applicability

221. Upon the Date of Entry, the SRPs at the Premcor Refineries shall be "affected facilities" pursuant to 40 C.F.R. Part 60, Subpart J, and shall comply with the applicable provisions of 40 C.F.R. Part 60, Subparts A and J, as such requirements apply to SRPs. For emission unit P025 at the Lima Refinery, Premcor shall certify compliance with the applicable provisions of 40 C.F.R. Part 60, Subpart J, to EPA and the applicable Plaintiff Intervenor by no later than April 1, 2008.

222. The SRPs at the Premcor Refineries are as follows:

Refinery	SRP	Claus Train	NSPS Subpart
Memphis	Memphis SRP	Claus #1	Date of Entry
		Claus #2	Date of Entry
Lima	Lima SRP	Claus #1	Date of Entry
		Claus #2	Date of Entry
Port Arthur	Port Arthur SRP	543 100 Train	Date of Entry
		543 300 Train	Date of Entry
		544 500 Train	Date of Entry
		544 400 Train	Date of Entry
		545 100 Train	Date of Entry
		545 200 Train	Date of Entry
		546 600 Train	Date of Entry
		546 700 Train	Date of Entry

223. Reserved.

224. Upon the Date of Entry, all emission points (stacks) to the atmosphere for tail gas emissions from each of its SRPs will be monitored and reported upon in accordance with 40 C.F.R. §§ 60.7(c), 60.13, and 60.105. This requirement is not applicable to the AG Flaring Devices identified in Appendix K.

225. Nothing in this Addendum shall be interpreted to limit Premcor's opportunity to submit for EPA approval alternative monitoring procedures or requirements pursuant to 40 C.F.R., Part 60, Subpart A, for emissions from SRPs.

226. By no later than one (1) year after the Date of Entry, Premcor shall re-route any SRP sulfur pit emissions from the refineries subject to this Addendum such that all sulfur pit emissions to the atmosphere are either eliminated or included as part of the applicable SRP's emissions subject to NSPS Subpart J limit for SO_2, as a 12-hour rolling average, of 250 ppmvd SO_2, or 300 ppm reduced sulfur, each at 0% oxygen, as required by 40 C.F.R. § 60.104(a)(2).

227. During the life of this Addendum and for the purpose of determining compliance with the SRP emission limits, Premcor shall apply the "startup" and "shutdown" provisions set forth in NSPS Subpart A to the SRP but not to the independent startup or shutdown of its corresponding control device(s) (e.g., TGTU). However, the malfunction exemption set forth in NSPS Subpart A shall apply to both the SRP and its control device(s) (e.g., TGTU).

228. With respect to the Port Arthur Refinery, in order to further enhance operations of its SRPs, further reduce emissions of SO_2, further reduce AG Flaring Incidents and ensure compliance with 40 C.F.R. Part 60, Subparts A and J, Premcor shall implement the following actions at that refinery by the dates listed below:

a. Construct Additional Claus Trains – 546-600 and 546-700 by Date of Entry.

b. Revamp the GFU 241 and 242 Rich Amine Flash drum to include oil skimming facilities and skim oil pumps by December 31, 2009.

c. Install a rich amine flash drum at GFU 243 by December 31, 2009.

d. - g. Reserved.

229. Good Operation and Maintenance. Within one year of the Date of Lodging, Premcor shall submit to EPA and the appropriate Plaintiff-Intervener, a summary of plans for the Premcor Refineries to implement enhanced maintenance and operation of their SRPs, any supplemental control

devices, and the appropriate Upstream Process Units that have been or will be implemented. These plans shall be termed Preventive Maintenance and Operation Plans ("PMO Plans"). Each PMO Plan shall be a compilation of Premcor approaches for exercising good air pollution control practices and for minimizing SO_2 emissions at its Refinery(ies). The PMO Plan shall provide for continuous operation of its SRPs between scheduled maintenance turnarounds with minimization of emissions, including the continued use of supplemental control devices (e.g., amine/caustic scrubbers). The PMO Plan shall include, but not be limited to, sulfur shedding procedures, startup and shutdown procedures, hot standby procedures, emergency procedures and schedules to coordinate maintenance turnarounds of the SRP Claus trains and any supplemental control devices with scheduled turnarounds of major Upstream Process Units. The PMO Plan shall have as a goal the elimination of Acid Gas Flaring. Premcor shall comply with the PMO Plan at all times, including periods of Startup, Shutdown and Malfunction of its SRPs. If Premcor makes changes to a PMO Plan related to minimizing Acid Gas Flaring and/or SO_2 emissions, such changes shall be summarized and reported to EPA and the appropriate Plaintiff-Intervener on an annual basis.

229A. In addition, Premcor shall, along with each PMO described above, provide a brief description of the causes of Acid Gas Flaring at each refinery for each Acid Gas Flaring Incident that occurred from January 1, 2002 through December 31, 2006:

i. The date and time that the AG Flaring Incident started and ended (if available or reasonably determinable);

ii. An estimate of the quantity of sulfur dioxide emitted and the calculations used to determine that quantity (if available or reasonably determinable); and

iii. A description of the Root Cause and corrective actions, if any, that were taken and/or should be incorporated into the PMO to reduce the likelihood of a recurrence of such AG Flaring Incident (if reasonably available but only to the extent such Refinery was then owned by Premcor).

230. EPA and the appropriate Plaintiff-Intervener do not, by their review of a PMO Plan and/or by their failure to comment on a PMO Plan, warrant or aver in any manner that any of the actions that Premcor may take pursuant to such PMO Plan will result in compliance with the provisions of the Clean Air Act or any other applicable federal, state, or local law or regulation. Notwithstanding EPA's or appropriate Plaintiff-Intervener's review of a PMO Plan, Premcor shall remain solely responsible for compliance with the Clean Air Act and such other laws and regulations.

C. **Flaring Devices - NSPS Applicability**

231. In accordance with the schedule in this Section XII.C, Premcor accepts NSPS Subpart J applicability for each Flaring Device at the Premcor Refineries, as currently identified in Appendix N.

232. – 233. Reserved.

234. Good Air Pollution Control Practices. On and after the Date of Entry, Premcor shall at all times and to the extent practicable, including during periods of Startup, Shutdown, and/or Malfunction, implement good air pollution control practices for minimizing emissions consistent with 40 C.F.R. § 60.11(d).

235. For each Flaring Device, Premcor will elect to use one or any combination of the following NSPS Subpart J compliance methods:

a. Operate and maintain a flare gas recovery system to control continuous or routine combustion in the Flaring Device. Use of a flare gas recovery system on a flare obviates the need to continuously monitor and maintain records of hydrogen sulfide in the gas as otherwise required by 40 C.F.R. §§ 60.105(a)(4) and 60.7;

b. Operate the Flaring Device as a fuel gas combustion device and comply with NSPS monitoring requirements by use of a CEMS pursuant to 40 C.F.R. § 60.105(a)(4) or with a predictive monitoring system approved by EPA as an alternative monitoring system pursuant to 40 C.F.R. § 60.13(i);

c. Eliminate the routes of continuous or intermittent, routinely-generated fuel gases to a Flaring Device and operate the Flaring Device such that it receives only process upset gases, fuel gas released as a result of relief valve leakage or gases released due to other emergency malfunctions; or

d. Eliminate to the extent practicable routes of continuous or intermittent, routinely-generated fuel gases to a Flaring Device and monitor the Flaring Device by use of a CEMS and a flow meter; provided however, that this compliance method may not be used unless Premcor : (i) demonstrates to EPA that the Flaring Device in question emits less than 500 pounds per day of SO_2 under normal conditions; (ii) secures EPA approval for use of this method as the selected compliance method; and (iii) uses this compliance method for five or fewer of the Flaring Devices listed in Appendix N.

236. For the compliance method described in Paragraph 235(b), to the extent that Premcor seeks to use an alternative monitoring method at a particular Flaring Device to demonstrate compliance with the limits at 40 C.F.R. § 60.104(a)(1), Premcor may begin to use the method immediately upon submitting the application for approval to use the method, provided that the alternative method for which approval is being sought is the same as or is substantially similar to the method identified as the "Alternative Monitoring Plan for NSPS Subpart J Refinery Fuel Gas" attached hereto as Appendix D.

237. Compliance Plan for Flaring Devices. For each Covered Refinery, Premcor will submit a Compliance Plan for Flaring Devices to EPA and the applicable Plaintiff-Intervener by no later than December 31, 2009.

238. In each Refinery's Compliance Plan for Flaring Devices, Premcor will:

a. Certify compliance with one or more of the four compliance methods set forth in Paragraph 235 and accept NSPS applicability for at least (i) 50% of the system-wide Flaring Devices identified in Appendix N, (ii) one Flaring Device per

Refinery where such Refinery has three or more Flaring Devices, and (iii) at the Lima Refinery the FCC (North) flare which serves the coker unit, provided, however, that if the selected compliance method is a flare gas recovery system, as identified in Paragraph 235(a), then Premcor may certify that compliance will be achieved by no later than December 31, 2010;

b. Identify the Paragraph 235 compliance method(s) used for each Flaring Device that Premcor identifies under Paragraph 237;

c. Describe the activities that Premcor has taken or anticipates taking, together with a schedule, to meet the objectives of Paragraph 237 at each Refinery; and

d. Describe the anticipated compliance method(s) and schedule that Premcor will undertake for the remaining Flaring Devices identified in Appendix N.

239. By no later than December 31, 2013, Premcor will certify compliance to EPA and the applicable Plaintiff-Intervener with one or more of the four compliance methods in Paragraph 235 and will accept NSPS applicability for all of the Flaring Devices in Appendix N.

240. Performance Tests. By no later than ninety (90) days after bringing a Flaring Device into compliance by using the methods in Paragraph 235(b) or (d), Premcor will conduct a flare performance test pursuant to 40 C.F.R. §§ 60.8 and 60.18, or an EPA-approved equivalent method unless such performance test has previously been performed. In lieu of conducting the velocity test required in 40 C.F.R. § 60.18, Premcor may submit velocity calculations that demonstrate that the Flaring Device meets the performance specification required by 40 C.F.R. § 60.18.

241. The combustion in a Flaring Device of process upset gases or fuel gas that is released to the Flaring Device as a result of relief valve leakage or other emergency malfunctions is exempt from the requirement to comply with 40 C.F.R. § 60.104(a)(1).

D. Investigation and Reporting

241A. Premcor shall conduct a review of each of the three Premcor Refineries for the five (5) years prior to the Date of Lodging in an effort to identify any releases that may have been reportable under Section 103(a) of CERCLA, 42 U.S.C. § 9603(a), and Section 304 of EPCRA, 42 U.S.C. § 11004 or similar or corresponding state reporting regulations. Upon completion of this review, Premcor shall resolve its liability for violations of Section 103(a) of CERLA and Section 304 of EPCRA or similar or corresponding state reporting regulations with respect to the events identified in its compliance review by completing the following activities no later than December 31, 2007:

a. submit a CERCLA/EPCRA Compliance Review Report to EPA and Plaintiff-Interveners that identifies potential violations of Section 103(a) of CERCLA and Section 304 of EPCRA or similar or corresponding state reporting regulations for which Premcor seeks a resolution of liability; and

b. correct and/or update procedures to ensure compliance in future; and

c. conduct CERCLA/EPCRA training for the environmental compliance staff at each of the three Premcor Refineries.

242. Beginning no later than ninety (90) days after the Date of Lodging, Premcor shall submit a report to EPA and the applicable EPA Regional Office within sixty (60) days following the end of each AG Flaring Incident, Hydrocarbon Flaring Incident or Tail Gas Incident at a Premcor Refinery. Such reports shall set forth the following information concerning the Incident (a "Root Cause Failure Analysis" or "RCFA"):

1. The date and time that the Incident started and ended. To the extent that the Incident involved multiple releases either within a twenty-four (24) hour period or within subsequent, contiguous, non-overlapping twenty-four (24) hour periods, Premcor shall set forth the starting and ending dates and times of each release;

2. An estimate of the quantity of SO_2 that was emitted and the calculations that were used to determine that quantity;

3. The steps, if any, that Premcor took to limit the duration and/or quantity of SO_2 emissions associated with the Incident;

4. A detailed analysis that sets forth the Root Cause of that Incident, to the extent determinable;

5. An analysis of the measures, if any, that are reasonably available to reduce the likelihood of a recurrence of the Incident resulting at the same refinery from the same Root Cause(s) in the future. The analysis shall discuss the alternatives, if any, that are reasonably available, the probable effectiveness and cost of the alternatives, and whether or not an outside consultant should be retained to assist in the analysis. Possible design, operational, and maintenance changes shall be evaluated.

6. Either a description of corrective action(s) under Paragraph 245 and, if not already completed, a schedule for its (their) implementation, including proposed commencement and completion dates, or an explanation that corrective action(s) is (are) not required;

7. For AG Flaring and Tail Gas Incidents at any Premcor refinery and for HC Flaring Incidents at the Port Arthur Refinery, a statement that:

   a. Specifically identifies each of the grounds for stipulated penalties in Section XII.F of this Decree and describes whether or not such incident falls under any of those grounds;

   b. Describes whether Paragraph 250 or 251 applies and why, or if such incident falls under Paragraph 252 of this Decree, describes whether subparagraph 252(a), (b), or (c) applies and why; and

c. States whether or not Premcor asserts a defense to such incident, and if so, a description of such defense.

8. To the extent that investigations of the causes and/or possible corrective actions still are underway on the due date of the report, a statement of the anticipated date by which a follow-up report fully conforming to the requirements of this Paragraph 242 will be submitted; provided, however, that if Premcor, has not submitted a report or a series of reports containing the information required to be submitted under this paragraph within sixty (60) days (or such additional time as EPA may allow) after the due date for the initial report for any incident, the stipulated penalty provisions of Paragraph 260(d) shall apply for failure to timely submit the report. Nothing in this paragraph shall be deemed to excuse Premcor from its investigation, reporting, and corrective action obligations under this Part XII for any incident which occurs after another incident for which Premcor has requested an extension of time under this paragraph; and

9. To the extent that completion of the implementation of corrective action(s), if any, is not finalized at the time of the submission of the report required under this Paragraph 242, then, by no later than thirty (30) days after completion of the implementation of corrective action(s), Premcor shall submit a report identifying the corrective action(s) taken and the dates of commencement and completion of implementation.

243. With respect to HC Flaring Incidents and in lieu of analyzing possible corrective actions under Section XII.E and taking interim and/or long-term corrective action under that section for a Hydrocarbon Flaring Incident attributable to the startup or shutdown of a unit that Premcor previously analyzed under this Section XII.D, Premcor may identify such prior analysis when submitting the report required under Paragraph 242. Prior to the installation of a flare gas recovery system identified

under Paragraph 235(a) but only after notice to EPA under Paragraph 237, Premcor shall not be required to identify or implement corrective action(s) under Paragraphs 242 and 245, for HC Flaring Incidents unless more than 500 lbs. of SO_2 would have been released if such equipment had been installed and in use. If Premcor determines that the Hydrocarbon Flaring Incident is attributable solely to the combustion of refinery fuel gas that contains less than 162 ppm of H_2S, it shall so demonstrate in its report under Paragraph 242, and no further action shall be required for that Incident under this Section XII.D. In addition, or in the alternative, if Premcor determines that the Hydrocarbon Flaring Incident is attributable to the combustion of a stream or streams of Continuous or Intermittent Routinely-Generated Fuel Gases prior to Premcor's implementing actions to address such stream(s) when and as required by Paragraphs 235 and 238 but only after notice to EPA under Paragraph 237, it shall so demonstrate in its report under Paragraph 242 and no further action shall be required for that Incident under this Section XII.D. Notwithstanding Paragraph 242, Premcor may submit reports for Hydrocarbon Flaring Incidents at the Lima and Memphis Refineries as part of the Semi-annual Progress Reports required pursuant to Part XVI, but Premcor may not submit reports for Hydrocarbon Flaring Incidents at the Port Arthur Refinery as part of the Semi-annual Progress Reports.

244. With respect to Hydrocarbon Flaring Incidents occurring prior to certifying compliance under Paragraph 238 or 239, Premcor may prepare and submit a single RCFA for one or more Root Causes found by that analysis to routinely reoccur. Premcor shall inform EPA and the relevant Plaintiff-Intervener in that RCFA that it is electing to report only once on that (those) Root Cause(s) during the interim period. Unless EPA or the relevant Plaintiff-Intervener objects within thirty (30) days of receipt of the RCFA, such election shall be effective.

E. <u>Corrective Action</u>

245. In response to any Incident, Premcor, as expeditiously as reasonably practicable, shall take such interim and/or long-term corrective actions, if any, as are reasonable and consistent with

good engineering practice to minimize the likelihood of a recurrence of the Root Cause of that Incident.

245A. Premcor shall implement the following corrective action at the Port Arthur Refinery:

(1) Delayed Coker 843 Wet Gas Compressor Reliability

a. Upgrade and install an adequate level of redundancy in the UPS supply serving critical compressor instrumentation and Fail Safe Control systems by December 31, 2009;

b. Develop for the coker's current cycle and for any subsequent cycle a task schedule similar to Foster Wheeler's task schedule for the 18-hour cycle by June 30, 2007;

(2) SGRU 1242 Sats Gas Compressor Reliability

a. Retrofit advanced compressor surge and molecular weight control systems on the existing compressor by December 31, 2009;

b. Integrate the compressor control system with the unit DCS such that the cause of any compressor trip is identified and recorded by December 31, 2009;

(3) Improve Amine Unit Process Control

a. Install redundant nozzles/level transmitter/indication on D-1250 Cold LP Separator OH KO Drum by December 31, 2009;

b. Relocate high level alarm on D1260 product stripper reflux drum by June 30, 2007;

c. Install redundant nozzles/level transmitter/indication on D-1260 product stripper reflux drum by December 31, 2009;

d. Install differential pressure transmitters across dP indicator on T-1530 at HCU 942 by June 30, 2007;

e. Install redundant pressure indication on D-1290 Fractionator Feed Flash Drum (stripper bottoms) at HCU 942 by December 31, 2009;

f. Install redundant nozzles/level transmitter/indication on D-6850 C3/C4 Amine Settler by December 31, 2009;

g. Install redundant nozzles/level transmitter/indication on T-6880 Coker Sponge Absorber by December 31, 2009;

h. Automate purge on T-101 Pump-around at ATU 7841 by 06/30/2007;

(4) Install oil skimming on T-4002 spent amine tank by December 31, 2009; and

(5) Revamp D-102 Amine/Oil Coalescer at ATU 7841 by December 31, 2007.

246. If EPA does not notify Premcor in writing within sixty (60) days of receipt of the report(s) required by Paragraph 242 that it objects to one or more aspects of Premcor's proposed corrective action(s), if any, and schedule(s) of implementation, if any, then that (those) action(s) and schedule(s) shall be deemed acceptable for purposes of compliance with Paragraph 245 of this Addendum.

247. EPA does not, by its agreement to the entry of this Addendum or by its failure to object to any corrective action that Premcor may take in the future, warrant or aver in any manner that any of Premcor's corrective actions in the future will result in compliance with the provisions of the Clean Air Act or its implementing regulations. Notwithstanding EPA's review of any plans, reports, corrective actions or procedures under this Part XII, Premcor shall remain solely responsible for non-compliance with the Clean Air Act and its implementing regulations. Nothing in this paragraph shall be construed as a waiver of EPA's rights under the Clean Air Act and its regulations for future violations of the Act or its regulations.

248. If EPA does object, in whole or in part, to Premcor's proposed corrective action(s) and/or its schedule(s) of implementation, or, where applicable, to the absence of such proposal(s) and/or schedule(s), it shall notify Premcor of that fact within sixty (60) days following receipt of the

RCFA required by Paragraph 242. EPA shall not, in such notice, amend or modify the schedule of activities identified in Paragraphs 228 and 245a. If EPA and Premcor cannot agree on the appropriate corrective action(s), if any, to be taken in response to a particular Incident, either Party may invoke the Dispute Resolution provisions of Part XXIII of the Addendum.

F. AG Flaring, Tail Gas Incidents, Port Arthur Hydrocarbon Flaring Incidents And Stipulated Penalties

249. The provisions of this Section XII.F are intended to implement the process outlined in the logic diagram attached hereto as Appendix F to this Addendum. These provisions shall be interpreted and construed, to the maximum extent feasible, to be consistent with that Appendix. However, in the event of a conflict between the language of those paragraphs and Appendix F, the language of those paragraphs shall control.

250. The stipulated penalty provisions of Paragraph 260(a) shall apply to any Acid Gas Flaring or Tail Gas Incident at a Premcor Refinery, or Hydrocarbon Flaring Incident at the Port Arthur Refinery ("Port Arthur HC Flaring Incident"), for which the Root Cause was one or more of the following acts, omissions, or events:

a. Error resulting from careless operation by the personnel charged with the responsibility for the Sulfur Recovery Plant, TGU, or Upstream Process Units;

b. Failure to follow written procedures;

c. A failure of a part, equipment or system that is due to a failure by Premcor to operate and maintain that part, equipment or system in a manner consistent with good engineering practice;

d. With respect to the Port Arthur Refinery, a HC Flaring Incident resulting from any of the following root causes once the corresponding corrective action has been completed pursuant to Paragraph 245a:

i. Short-term loss of power to critical Coker 843 Wet Gas Compressor instrumentation and fail safe control systems.

ii. Trips of K-2300 A/B Wet Gas Compressors from surging because of low molecular weight feed streams.

iii. Lack of capturing and recording operating data generated by SGRU 1242 compressor control system in the distributed control system does not allow troubleshooting the cause of a K-2300 A/B Wet Gas Compressors trips.

iv. Process upset due to erroneous level indication in D-1250 Cold LP Separator OH KO Drum at HCU 942 caused by plugging of a nozzle.

v. High elevation of the high level alarm point on D-1260 Product Stripper Reflux Drum at HCU 942 does not allow operators additional time to correct a rising level situation before drum overfill.

vi. Process upset due to erroneous level indication in D-1260 Product Stripper Reflux Drum at HCU 942 caused by plugging of a nozzle.

vii. Lack of dP indicator and pressure transmitter on T-1530 at HCU 942 does not provide Operators an early warning of when to inject anti-foam agent into the amine absorber.

viii. Lack of duplicate pressure transmitters on D-1290 Fractionator Feed Flash Drum (stripper bottoms) at HCU 942 increases the likelihood of erroneous pressure indication due to instrument failure.

ix. Process upset due to erroneous level indication in D-6850 C3/C4 Amine Settler at ATU 7841 caused by plugging of a nozzle.

x. Process upset due to erroneous level indication in T-6880 Coker Sponge Absorber at DCU 843 caused by plugging of a nozzle.

xi. Lack of automatic purging in T-101 Pump-Around at ATU 7841 can result in over-purging and lost of pump suction at P-101A/B Pump-Around Pumps, thereby causing an upset to T-101 Amine Regenerator.

xii. Lack of oil skimming system does not allow the separation of oil from the solvent in T-4002 Spent Amine Tank at ATU 7841.

xiii. Inadequate efficiency of D-102 Coalescer at ATU 7841 does not allow for better separation of oil from the solvent in T-4002 Spent Amine.

xiv. Failure to update the task schedule for DCU 843 to match the Coker's current cycle.

e. With respect to the Port Arthur Refinery, an AG Flaring Incident resulting from any of the following root causes once the corresponding corrective action has been completed pursuant to Paragraph 228:

i. Failure to install additional Claus Trains 546-600 and 546-700.

ii. Failure to revamp the GFU 241 and 242 Rich Amine Flash drum to include oil skimming facilities and skim oil pumps.

iii. Failure to install a rich amine flash drum at GFU 243.

251. If the AG Flaring Incident, Tail Gas Incident or Port Arthur HC Flaring Incident is not a result of one of the root causes identified in Paragraph 250, then the stipulated penalty provisions of Paragraph 260(a) shall apply if the AG Flaring Incident, Tail Gas Incident or Port Arthur HC Flaring Incident:

a. Results in emissions of sulfur dioxide at a rate greater than twenty (20.0) pounds per hour continuously for three (3) consecutive hours or more and Premcor failed to act consistent with the PMO Plan and/or to take any action during the Incident to limit the duration and/or quantity of SO_2 emissions associated with such incident; or

b. With respect to any of the Premcor Refineries, causes the total number of Acid Gas Flaring Incidents in a rolling twelve (12) month period to exceed five (5) or causes the total number of Tail Gas Incidents in a rolling twelve (12) month period to exceed five (5), or, with respect to only the Port Arthur Refinery, causes the total number of Port Arthur HC Incidents in a rolling twelve (12) month period to exceed ten (10) for the first three (3) years following the Date of Entry of this Addendum or causes the total number of Port Arthur HC Incidents in a rolling twelve (12) month period to exceed five (5) thereafter. In the event that an Incident falls under both Paragraphs 250 and 251, then Paragraph 250 shall apply.

252. With respect to any AG Flaring Incident, Tail Gas Incident or Port Arthur HC Flaring Incident not identified in Paragraph 250 or 251, the following provisions shall apply:

a. Agreed Upon Malfunction: If the Root Cause of the Incident was sudden, infrequent, and not reasonably preventable through the exercise of good engineering practice, then that cause shall be designated as an agreed-upon malfunction for purposes of reviewing subsequent Incidents, and the stipulated penalty provisions of Paragraph 260 shall not apply.

b. First Time: If the Root Cause of the Incident was sudden and infrequent but reasonably preventable through the exercise of good engineering practices, then Premcor shall implement corrective action(s) pursuant to Paragraph 245 and the stipulated penalty provisions of Paragraph 260 shall not apply.

c. Recurrence: If the Root Cause of the Incident is a recurrence of the same Root Cause that caused a previous Incident occurring after the Date of Entry, then the stipulated penalty provisions of Paragraph 260(a) shall apply unless either the Root Cause of the previous Incident was designated as an Agreed Upon Malfunction under Paragraph 252.a, or Premcor was in the process of

timely developing or implementing a corrective action plan under Paragraphs 228, 242, 245, or 245a for such previous Incident.

253. Defenses: Premcor may raise the following affirmative defenses in response to a demand by the United States for stipulated penalties:

a. Force majeure.

b. As to Paragraph 250, the Incident does not meet the identified criteria.

c. As to Paragraph 251, the Incident does not meet the identified criteria and/or was due to a Malfunction.

d. As to Paragraph 252, the Incident does not meet the identified criteria, was due to a Malfunction and/or Premcor was in the process of timely developing or implementing a corrective action plan under Paragraphs 228, 242, 245, or 245a for the previous Incident.

e. In the event a dispute under Paragraph 250 or 251 is brought to the Court pursuant to the Dispute Resolution provisions of this Addendum, Premcor may also assert a start up, shutdown and/or upset defense, but the United States shall be entitled to assert that such defenses are not available. If Premcor prevails in persuading the Court that the defenses of startup, shutdown and/or upset are available for Incidents under 40 C.F.R. § 60.104(a)(1), Premcor shall not be liable for stipulated penalties for emissions resulting from such startup, shutdown and/or upset. If the United States prevails in persuading the Court that the defenses or startup, shutdown and/or upset are not available, Premcor shall be liable for such stipulated penalties.

254. Other than for a Malfunction or force majeure, if no Incident and no violation of the emission limits under section XII.B occurs at a Refinery for a rolling 36 month period, then the stipulated penalty provisions of Paragraph 260(a) shall no longer apply to that Refinery. EPA may

elect to prospectively reinstate the stipulated penalty provision if Premcor has an Incident which would otherwise be subject to stipulated penalties. EPA's decision shall not be subject to dispute resolution. Once reinstated, the stipulated penalty provision shall continue for the remaining life of this Addendum for that Refinery.

G. Miscellaneous

255. Calculation of the Quantity of Sulfur Dioxide Emissions resulting from AG and HC Flaring. For purposes of this Addendum, the quantity of SO_2 emissions resulting from AG Flaring shall be calculated by the following formula:

Tons of SO_2 = [FR][TD][ConcH_2S][8.31×10^{-5}].

The quantity of SO_2 emitted shall be rounded to one decimal point. (Thus, for example, for a calculation that results in a number equal to 10.050 tons, the quantity of SO_2 emitted shall be rounded to 10.1 tons and 10.049 tons would be rounded to 10.0 tons.) For purposes of determining the occurrence of, or the total quantity of SO_2 emissions resulting from, an AG Flaring Incident that is comprised of intermittent AG Flaring, the quantity of SO_2 emitted shall be equal to the sum of the quantities of SO_2 flared during each such period of intermittent AG Flaring.

256. Calculation of the Rate of SO_2 Emissions during AG and HC Flaring. For purposes of this Addendum, the rate of SO_2 emissions resulting from AG Flaring shall be expressed in terms of pounds per hour, and shall be calculated by the following formula:

ER = [FR][ConcH_2S][0.166].

The emission rate shall be rounded to one decimal point. (Thus, for example, for a calculation that results in an emission rate of 19.950 pounds of SO_2 per hour, the emission rate shall be rounded to 20.0 pounds of SO_2 per hour; for a calculation that results in an emission rate of 19.949 pounds of SO_2 per hour, the emission rate shall be rounded to 19.9.)

257. Meaning of Variables and Derivation of Multipliers used in the Equations in Paragraphs 255 and 256:

ER = Emission Rate in pounds of Sulfur Dioxide per hour

FR = Average Flow Rate to Flaring Device(s) during Flaring, in standard cubic feet per hour

TD = Total Duration of Flaring in hours

ConcH_2S = Average Concentration of Hydrogen Sulfide in gas during Flaring (or immediately prior to Flaring if all gas is being flared) expressed as a volume fraction (scf H_2S/scf gas)

8.31×10^{-5} = [lb. mole H_2S/385 scf H_2S][64 lbs. SO_2/lb. mole H_2S][Ton/2000 lbs.]

0.166 = [lb. mole H_2S/385 scf H_2S][1.0 lb mole SO_2/1 lb. mole H_2S][64 lb. SO_2/1.0 lb. mole SO_2]

Standard conditions: 68 deg. F, 14.7 lb.-force/sq.in. absolute

The flow of gas to the AG Flaring Device(s) ("FR") shall be as measured by the relevant flow meter or as calculated through the exercise of best engineering judgment. Hydrogen sulfide concentration ("ConcH_2S") shall be determined from any installed SRP feed gas analyzer. In the event that the flow of gas is not measured by an SRP feed gas analyzer or the data point is inaccurate, the missing or inaccurate data point(s) shall be estimated according to best engineering judgment. The report required under Paragraph 242 shall include the data used in the calculation and an explanation of the basis for any estimates of missing data points.

258. Calculation of the Quantity of SO_2 Emissions resulting from a Tail Gas Incident. For the purposes of this Addendum, the quantity of SO_2 emissions resulting from a Tail Gas Incident shall be calculated by one of the following methods or an equivalent method approved by EPA, based on the type of event:

a. If the event constitutes a Tail Gas Incident meeting the definition of Paragraph 220(17)(a), the SO_2 emissions are calculated using the methods outlined in Paragraph 255, or

b. If the event constitutes a Tail Gas Incident meeting the definition of Paragraph 220(17)(b), then the following formula applies to each twenty-four (24) hour period of an incident beginning with the first hour that the rolling twelve (12) hour average SO_2 concentration exceeds the

250 ppmvd Subpart J limit and ending with the twenty-four (24) hour period in which the 250 ppmvd NSPS limit is last exceeded. Total SO_2 emissions during an incident are determined by summing the emissions during each twenty-four (24) hour period of the incident:

$$ER_{TGI} = \sum_{i=1}^{H_{TGI}} \left([FR_{Inc.}]_i \, [\text{Conc. } SO_2 - 250]_i \, [(20.9 - \%O_2)/20.9]_i \, [0.166 \times 10^{-6}] \right)$$

Where:

ER_{TGI} = Excess Emissions from Tail Gas at the SRP incinerator, in SO_2 lbs. over a twenty-four (24) hour period

$FR_{Inc.}$ = Incinerator Exhaust Gas Flow Rate (standard cubic feet per hour, dry basis) (actual stack monitor data or engineering estimate based on the acid gas feed rate to the SRP) for each hour of the incident.

Conc. SO_2 = Actual SO_2 concentration (CEM data) in the incinerator exhaust gas, ppmvd adjusted to 0% O_2 for each hour of the incident

% O_2 = O_2 concentration (CEM data) in % in the incinerator exhaust gas on dry basis for each hour of the incident

0.166×10^{-6} = [lb. mole of SO_2 / 385 SO_2] [64 lbs. SO_2 /lb. mole SO_2] [1×10^{-6}]

H_{TGI} = Hours when the incinerator CEM was exceeding 250 ppmvd adjusted to 0% O_2 in each twenty-four (24) hour period of the incident (as described above).

Standard conditions: 68 deg. F, 14.7 lb.-force/sq.in. absolute

In the event the SO_2 and/or the O_2 CEM hourly concentration data are inaccurate or not available or a flow meter for FR_{Inc}, does not exist or is inoperable, then estimates will be used based on best engineering judgment.

259. Any disputes under the provisions of this Part XII shall be resolved in accordance with Part XXIII (Dispute Resolution) of this Addendum.

H. Stipulated Penalties Under This Part

260. Except for Port Arthur HC Flaring Incidents, nothing in this Part XII shall be understood to subject Premcor to stipulated penalties for HC Flaring Incidents under Paragraph 260(a). Premcor shall be liable for stipulated penalties for any Port Arthur HC Flaring Incident, to the extent that such Port Arthur HC Flaring Incident does not qualify for a defense to stipulated penalties authorized under this Addendum. Premcor shall be liable for the following stipulated penalties for violations of the requirements of this Part. For each violation, the amounts identified below apply on the first day of violation, and are calculated for each incremental period of violation (or portion thereof):

a. AG Flaring Incidents and Port Arthur HC Flaring Incidents for which Premcor is liable under this Part. Stipulated penalties for Port Arthur HC Flaring Incidents shall be equal to seventy-five percent (75%) of the penalty for AG Flaring Incidents.

Tons Emitted in AG Flaring Incident	Length of Time from Commencement of Flaring within the AG Flaring Incident to Termination of Flaring within the AG Flaring Incident is 3 hours or less	Length of Time from Commencement of Flaring within the AG Flaring Incident to Termination of Flaring within the AG Flaring Incident is greater than 3 hours but less than or equal to 24 hours	Length of Time from Commencement of Flaring within the AG Flaring Incident to Termination of Flaring within the AG Flaring Incident is greater than 24 hours
5 Tons or Less	$500 per ton	$750 per ton	$1000 per ton
Greater than 5 tons, but less than or	$1,200 per ton	$1,800 per ton	$2,300 per ton, up to, but not

equal to 15 tons			exceeding, $27,500 in any one calendar day
Greater than 15 tons	$1,800 per ton, up to, but not exceeding, $27,500 in any one calendar day	$2,300 per ton, up to, but not exceeding, $27,500 in any one calendar day	$27,500 per calendar day

i. For purposes of calculating stipulated penalties pursuant to this subparagraph, only one cell within the matrix shall apply. Thus, for example, for an AG Flaring Incident in which the AG Flaring starts at 1:00 p.m. and ends at 3:00 p.m., and for which 14.5 tons of sulfur dioxide are emitted, the penalty would be $17,400 (14.5 x $1,200); the penalty would not be $13,900 [(5 x $500) + (9.5 x $1200)].

ii. For purposes of determining which column in the table set forth in this subparagraph applies under circumstances in which flaring occurs intermittently during an AG or Port Arthur HC Flaring Incident, the flaring shall be deemed to commence at the time that the flaring that triggers the initiation of an AG or Port Arthur HC Flaring Incident commences, and shall be deemed to terminate at the time of the termination of the last episode of flaring within the AG or Port Arthur HC Flaring Incident. Thus, for example, for AG Flaring within an AG Flaring Incident that (i) starts at 1:00 p.m. on Day 1 and ends at 1:30 p.m. on Day 1; (ii) recommences at 4:00 p.m. on Day 1 and ends at 4:30 p.m. on Day 1; (iii) recommences at 1:00 a.m. on Day 2 and ends at 1:30 a.m. on Day 2; and (iv) no further AG Flaring occurs within the AG Flaring Incident, the AG Flaring within the AG Flaring Incident shall be deemed to last 12.5 hours -- not

1.5 hours -- and the column for AG Flaring of "greater than 3 hours but less than or equal to 24 hours" shall apply.

b. For those corrective action(s) which Premcor is required to undertake following Dispute Resolution (Part XXIII), then, from the date EPA notifies Premcor of EPA's determination that corrective action, in addition to or distinct from any corrective action proposed by Premcor is required to respond to the Incident, reported under Paragraph 242, until the earlier of the following dates: (i) the date that a final agreement is reached between EPA and Premcor regarding the corrective action; or (ii) the date that a court order regarding the corrective action is entered:

$5,000 per month

c. Failure to complete any corrective action under Section XII.E of this Decree in accordance with the schedule for such corrective action agreed to by Premcor or imposed on Premcor pursuant to the Dispute Resolution provisions of Part XXIII of this Addendum provided (with any such extensions thereto as to which EPA and Premcor may agree in writing):

$5,000 per week

d. Failure to timely submit a report required by this Part XII, beginning on the seventh day past the report's due date:

$5,000 per week, per report

e. For submitting any report that does not include the elements identified in Paragraph 242, beginning on the seventh day after Premcor receives written notice from EPA of the deficiencies in such report and until corrected:

$5,000 per week, per report

I. Certification

261. All notices, reports or any other submissions required of Premcor by this Part XII shall contain the following certification:

"I certify under penalty of law that I have personally examined and am familiar with the information submitted herein and that I have made a diligent inquiry of those

individuals immediately responsible for obtaining the information and that to the best of my knowledge and belief, the information submitted herewith is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment."

262. Except as otherwise provided herein, the reporting requirements set forth in this Part XII do not relieve Premcor of its obligation to any State, local authority, or EPA to submit any other reports or information required by the CAA, or by any other state, federal or local requirements.

J. Flare Gas Recovery Systems

263. Periodic Maintenance of Flare Gas Recovery Systems. The Parties recognize that periodic maintenance may be required for properly designed and operated flare gas recovery systems. To the extent that Premcor currently operates or will operate flare gas recovery systems, Premcor will take all reasonable measures to minimize emissions while such periodic maintenance is being performed.

264. Safe Operation of Refining Processes. The Parties recognize that a flare gas recovery system may need to be bypassed in the event of an emergency, including unscheduled maintenance of such system in order to ensure continued safe operation of refinery processes. Nothing in this Addendum precludes Premcor from temporarily bypassing a flare gas recovery system under such circumstances. To the extent that a Hydrocarbon Flaring Incident at the Premcor Refineries has as its Root Cause the bypass of a flare gas recovery system for safety or maintenance reasons as stated above, Premcor will be required only to describe in the semiannual reports due under Part XVI the emergency or maintenance activity giving rise to the Hydrocarbon Flaring Incident at the Premcor Refinery, including an estimate of emissions, and to list the date, time, and duration of such Incident.

265. Commissioning. For the six (6) month period after the installation of a flare gas recovery system (that is, during the time in which the flare gas recovery system is being commissioned), Premcor will not be required to undertake Hydrocarbon Flaring Incident investigations if the Root Cause of the Hydrocarbon Flaring Incident is directly related to the commissioning of the flare gas recovery system and will not be required to take any further action.

266. Lima Refinery: Emissions Unit P025 – Benzene NESHAPS Sewer System.

a. Premcor shall install, operate and maintain a compressor system to route all Emissions Unit P025 (benzene NESHAP sewer system) vapors to an existing sulfur recovery unit fuel gas amine treater ("Compressor System") by no later than April 1, 2008. Premcor shall complete installation of the Compressor System in accordance with the following schedule:

i. Within thirty (30) days of the Date of Entry of this Addendum, Premcor shall complete the process design and perform the project detailed design. This includes the selection of the compressor design, procurement of financial funding, and completion of the detailed mechanical, electrical, instrumental and civil design.

ii. By no later than September 30, 2007, Premcor shall order all the long lead items. This includes, but is not limited to, procurement of materials and installation of auxiliary components.

iii. By April 1, 2008, Premcor shall complete the installation of the Compressor System and shall, thereafter, route all vapors to an existing sulfur recovery unit fuel gas amine treater.

b. Premcor shall submit progress reports for the requirements specified in Paragraph 266.a within fourteen (14) days after each completion date. The reports shall include a narrative description of whether the requirement has been completed and how it was accomplished, with any documentation necessary to demonstrate that the requirement was completed. If a requirement has not been completed, the report shall include an explanation of the reasons for the missed completion date, and a description of all actions to be taken to complete the requirement. In the event of a missed completion date, a follow-up progress report shall be submitted every fourteen (14) days after the initial report of non-completion until the requirement is completed. In addition to these progress reports, Premcor shall also submit a status reports concerning the work on the compressor system by July 1, 2007, fourteen (14) days after Date of Entry, and January 14, 2008.

c. Within thirty days after the completion of the installation of the Compressor System, Premcor shall submit Title V permit and permit to install modification applications to the State of Ohio that incorporate the requirements in 266.a. The applications shall include suggested monitoring, recordkeeping and reporting that are sufficient to provide reasonable assurance the Compressor System is properly routing the Emissions Unit P025 (benzene NESHAP sewer system) vapors to an existing sulfur recovery unit fuel gas amine treater, as well as addressing all other applicable requirements.

267. Reserved.

XIII. REFINERY SELF-EVALUATIONS AND AUDITS

A. Reserved

268. – 269. Reserved.

B. NSPS QQQ Audits

270. Premcor may elect to perform an audit of compliance with the regulatory obligations of Subpart QQQ of the NSPS, promulgated at 40 C.F.R Part 60, Subpart QQQ ("Subpart QQQ") at one or more Premcor Refineries ("QQQ Audit"). Within ninety (90) days of the Date of Lodging, Premcor shall notify EPA in writing which Premcor Refineries, if any, are electing to perform a QQQ Audit pursuant to this Section XIII.B.

271. QQQ Audits may cover all potential obligations from reporting years 1999 through Date of Entry of this Decree, including, but not limited to: (1) potential failures to make required applicability determinations; (2) potential failures to install proper control or monitoring equipment; (3) potential failures to undertake work practices; and (4) potential failures to submit accurate and/or timely reports.

272. The QQQ Audits may be performed by either an outside contractor or qualified internal staff. Premcor may, where appropriate, consult with EPA regarding the scope of any of the proposed

QQQ Audits. The QQQ Audits must be completed within one (1) year of notification under Paragraph 270.

273. For each Refinery electing to conduct a QQQ Audit, a final QQQ Audit report shall be submitted to EPA within thirty (30) days of completion of the QQQ Audit (the "QQQ Audit Report"). The QQQ Audit Report shall: describe the processes, procedures, and methodology used to conduct the audit; clearly identify any violations or potential violations of Subpart QQQ discovered at the Refinery through the QQQ Audit; describe any and all measures taken or to be taken to correct the disclosed violations; and provide details concerning the costs associated with such corrective action(s) and economic benefit(s) obtained by Premcor.

274. Each QQQ Audit report shall be signed by an appropriate company official and the following certification shall directly precede such signature:

> "I certify under penalty of law that I have personally examined and am familiar with the information submitted herein and that I have made a diligent inquiry of those individuals immediately responsible for obtaining the information and that to the best of my knowledge and belief, the information submitted herewith is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment."

275. Violations and potential violations reported in a QQQ Audit and corrected by the date of the QQQ Audit Report or such other reasonable additional time as EPA allows shall be deemed to satisfy the requirements of EPA's Audit Policy. Once EPA has made the determination that a QQQ Audit conducted by Premcor was consistent with the requirements of this Section XIII.B, EPA will notify Premcor in writing. Premcor shall thereupon be released from liability for any claims for civil and administrative penalties with respect to all violations or potential violations disclosed and corrected in accordance with this Part XIII, and contained in EPA's notification.

276. For each Refinery that undertakes a QQQ Audit, Premcor shall pay a stipulated penalty of $50,000, in total, for each such Refinery covering any and all disclosed violations, but if EPA determines that the economic benefit of non-compliance exceeds $25,000, Premcor shall pay an additional stipulated penalty equal to the difference between such economic benefit and $25,000.

277. Reserved.

C. **Refinery MACT I Audits**

278. Premcor may elect to perform an audit of compliance with the regulatory obligations of 40 C.F.R. Part 63, Subpart CC promulgated at 40 C.F.R Section 63.640 et seq., (the "Refinery MACT I") at one or more Premcor Refineries ("MACT Audit"). Within ninety (90) days of the Date of Lodging, Premcor shall notify EPA in writing which Refineries, if any, are electing to perform a MACT Audit pursuant to this Section XIII.C.

279. MACT Audits may cover all potential obligations from reporting years 1999 through Date of Entry of this Decree. Reporting obligations under MACT CC may include, but are not limited to: (1) potential failures to make required applicability determinations; (2) potential failures to install proper control or monitoring equipment; (3) potential failures to undertake work practices; and (4) potential failures to submit accurate and/or timely reports.

280. The MACT Audits may be performed by either an outside contractor or qualified internal staff. Premcor may, where appropriate, consult with EPA regarding the scope of any of the proposed MACT Audits. The MACT Audits must be completed by no later than one year of notification under Paragraph 278.

281. For each Refinery electing to conduct a MACT Audit, a final MACT Audit Report shall be submitted to EPA within 30 days of completion of the MACT Audit. The MACT Audit Report shall describe the processes, procedures, and methodology used to conduct the audit; clearly identify any violations or potential violations of Refinery MACT I discovered at the Refinery through the MACT Audit; describe any and all measures taken to correct the disclosed violations; and provide details concerning the costs associated with such corrective action(s) and economic benefit(s) obtained by Premcor.

282. Each MACT Audit Report shall be signed by an appropriate company official and the following certification shall directly precede such signature:

"I certify under penalty of law that I have personally examined and am familiar with the information submitted herein and that I have made a diligent inquiry of those individuals immediately responsible for obtaining the information and that to the best of my knowledge and belief, the information submitted herewith is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment."

283. Violations and potential violations reported in a MACT Audit Report and corrected by the date of the MACT Audit Report or such other reasonable additional time as EPA allows shall be deemed to satisfy the requirements of EPA's Audit Policy. Once EPA has made the determination that a MACT Audit conducted by Premcor was consistent with the requirements of this Section XIII.C, EPA will notify Premcor in writing. Premcor shall thereupon be released from liability for any claims for civil and administrative penalties with respect to all violations or potential violations disclosed and corrected in accordance with this Part XIII, and contained in EPA's notification.

284. For each Refinery that undertakes a MACT I Audit, Premcor shall pay a stipulated penalty of $50,000, in total, for such Refinery covering any and all disclosed violations, but if EPA determines that the economic benefit of its non-compliance exceeds $25,000, Premcor shall also pay an additional stipulated penalty equal to the difference between such economic benefit and $25,000.

285. Reserved.

XIV. PERMITTING

286. Construction. Premcor agrees to apply for and make all reasonable efforts to obtain in a timely manner all appropriate federally enforceable permits (or construction permit waivers) for the construction of the pollution control technology required to meet the above pollution reductions at the Premcor Refineries. For purposes of the PSD and New Source Review ("NSR") non-attainment regulations, any source subject to an optimization study or demonstration period pursuant to this Addendum, whether involving the construction of control equipment or utilization of catalyst additives, will not be deemed to have "commenced operation" as a modified source including such control technology or catalyst additive until after the optimization study or demonstration period, as applicable, is completed and applicable emission limitations are established for such source in

accordance with this Addendum. Nothing in this paragraph constitutes a determination by the United States or any Plaintiff-Intervener hereto, nor any admission by Premcor that any permit is required prior to the installation or operation of any equipment installed pursuant to this Addendum.

287. In submitting to the appropriate permitting authority an application for an air quality permit governing any emission control measure identified in this Addendum, Premcor may include in its permit application any contemporaneous changes associated with a single project. The calculation of the emission increase or decrease attributed to the project shall apply the following criteria:

a. The "baseline" emission rate used for the project shall reflect emissions of the relevant criteria pollutants prior to project implementation and shall not reflect projected emission reductions from any emission control measures identified in this Addendum prior to the date that such emission control measures are required or installed pursuant to this Addendum, whichever date is earlier (the "Pre-Project Baseline Emission Rate");

b. The projected emission rate attributable to the project following completion of the project governed by the permit application shall be based upon the net emission increase or decrease resulting from all contemporaneous changes that are part of a single project and that are reflected in the permit application (the "Post-Project Projected Emission Rate"); and

c. Both the Pre-Project Baseline Emission Rate and the Post-Project Projected Emission Rate shall otherwise be determined, and the resulting net emission increase otherwise calculated, in accordance with relevant regulations applicable at the time of permit application submittal.

288. In the event that any provision of this Addendum provides for imposition upon an emission unit of any emission limitation, either through the Addendum or any air quality permit to be issued in accordance with the terms of the Addendum, the compliance of the emission unit with the

relevant emission limitation shall be determined based only on emissions from the source subsequent to the effective date of the emission limitation.

289. – 290. Reserved.

291. Obtaining Permit Limits for Addendum Emission Limits and Standards That Are Effective Upon Entry. By no later than December 31, 2007, Premcor shall submit applications to the appropriate permitting authority to incorporate the emission limits and standards required by the Addendum that are effective as of the Date of Entry of the Addendum into federally enforceable minor or major new source review permits or other permits (other than Title V permits) which are federally enforceable. Following submission of the permit application, Premcor shall cooperate with the appropriate permitting authority by promptly submitting all information that such permitting authority seeks following its receipt of the permit application. Upon issuance of such permits or in conjunction with such permitting, Premcor shall file any applications necessary to incorporate the requirements of those permits into the Title V permit for the relevant refinery. Nothing in this Addendum is intended nor shall it be construed to require the establishment of emission limits (e.g., pounds per hour or tons per year) other than those concentration or rate based limits expressly prescribed in this Addendum.

292. Obtaining Permit Limits For Addendum Emission Limits That Become Effective After Date of Entry. As soon as practicable, but in no event later than ninety (90) days after the effective date or establishment of any emission limits and standards required by or under this Addendum, Premcor shall submit applications to the appropriate permitting authority to incorporate those emission limits and standards into federally enforceable minor or major new source review permits or other permits (other than Title V permits) which are federally enforceable. Following submission of the permit application, Premcor shall cooperate with the appropriate permitting authority by promptly submitting all information that such permitting authority seeks following its receipt of the permit application. Upon issuance of such permit or in conjunction with such permitting, Premcor shall file

any applications necessary to incorporate the requirements of that permit into the Title V permit of the appropriate refinery.

293. Mechanism for Title V Incorporation. The Parties agree that the incorporation of any emission limits or other standards into the Title V permits for the Premcor Refineries, as required under Paragraphs 291 and 292, shall be in accordance with the applicable state or local Title V rules.

294. This Addendum is not intended to require the continued use of a particular control technology past the compliance dates established in this Addendum. The parties agree that once the concentration based permit limits are established using the methodology provided for in the Addendum, Premcor may elect to comply with that concentration based permit limit through other control technology methods. Nothing here relieves Premcor from obtaining any appropriate state permits or authorizations to switch to such other control technology or methods.

XV. EMISSION REDUCTION CREDITS

295. This Part sets forth the exclusive process for Premcor to use any NOx or SO_2 emission reductions required by this Addendum as emission reduction credits for PSD netting or major nonattainment New Source Review ("NSR") offsets, or in any minor NSR permit or permit proceeding where such credits or offsets are relied upon to avoid PSD or major nonattainment NSR permitting. Except as provided in this Part, Premcor will neither generate nor use any NOx or SO_2 emission reductions resulting from any projects conducted pursuant to this Addendum as emission reduction credits or offsets in any PSD, major nonattainment and/or minor NSR permit or permit proceeding ("NSR Permit" or "NSR Permitting").

296. Outside the Scope of Prohibition. Nothing in this Addendum is intended to prohibit Premcor from:

a. utilizing or generating netting reductions or emission offset credits from refinery units that are covered by this Addendum to the extent that the proposed netting reductions or emission offset credits represent the difference between the

emissions limitations set forth in or used to meet the terms of this Addendum for these refinery units and the more stringent emissions limitations that Premcor may elect to accept for these refinery units in NSR Permitting;

b. utilizing or generating netting reductions or emission offset credits for refinery units that are not subject to an emission limitation pursuant to this Addendum;

c. utilizing emission reductions from the installation of controls required by this Addendum in determining whether a project that includes both the installation of controls under this Addendum and other construction occurring at the same time and that is permitted as a single project, triggers NSR Permitting; and

d. utilizing or generating emission reductions for a particular Refinery's compliance with any rules or regulations designed to address regional haze, state specific air quality issues, or the non-attainment status of any area (excluding NSR Permitting, but specifically including the Beaumont/Port Arthur Area NOx SIP, and other such programs) that apply to the particular Refinery. Notwithstanding the preceding sentence, Premcor will not trade or sell any emissions reductions to another refinery or plant.

A. **Generating NOx and SO_2 Emission Credits**

296A. For purposes of this Addendum, emissions credits for PSD netting and Nonattainment NSR offsets may be applied and used only at the refinery where they were generated.

297. Emission reduction credits generated by each unit shall be determined in accordance with the PSD/Nonattainment NSR regulations applicable to the relevant facility at the time the reductions are proposed to be generated. The quantity of emission reduction credits shall be calculated as the difference between such unit's baseline emissions and its applicable emissions at the time the emission reductions are proposed to be used for netting or are generated for offset purposes, as limited by the percentages expressed and the limitations on use set forth in Paragraphs 299 and 300.

298. To apply or use emission reduction credits under this Part, Premcor must make any such emission reductions federally enforceable. Such emission reductions are creditable for five years from their date of generation and shall survive termination of the Addendum.

B. Using NOx and SO_2 Emission Credits and Offsets

299. Subject to Paragraph 305, Premcor may use, without further restriction or limitation up to five percent (5%) of the NOx emission reductions achieved through its compliance with Part IV of this Addendum as emission reduction credits for netting and/or offsets in any NSR Permit after the Date of Entry of this Addendum; provided, however, that Premcor may use such NOx emission reductions for netting or offset proposes only at a new or modified heater or boiler that is designed to achieve an emission rate of 0.020 lbs NOx per million Btu (even if the burners do not achieve that emission rate in practice and a less stringent emission limit is therefore warranted); and provided further, however, that, to the extent that Premcor uses any NOx emission reduction credits from the five percent (5%) of the NOx emission reductions achieved through its compliance with Part IV of this Addendum pursuant to this sentence, then the quantity of credits available to Valero pursuant to Paragraph 299 of the Consent Decree shall be reduced by the number of NOx emission reduction credits used by Premcor pursuant to this sentence. Premcor may use up to an additional five percent (5%) of the NOx emission reductions achieved through its compliance with Part IV of this Addendum as emission reduction credits for netting and/or offsets in any PSD, Nonattainment NSR and/or minor NSR permit or permit proceeding after the Date of Entry of this Addendum only at a new or modified heater or boiler that is designed to achieve an emission rate of 0.020 lbs NOx per million Btu (even if the burners do not achieve that emission rate in practice and a less stringent emission limit is therefore warranted) and that is constructed or modified for purposes of compliance with Clean Fuels requirements. For purposes of this Addendum, a "Clean Fuels" requirement includes Tier II Gasoline, Low or Ultra Low Sulfur Diesel, ether based oxygenate replacement (but only to the extent such

replacement is demonstrated by Premcor), or other specialty fuels identified in or required under any SIP.

300. Subject to Paragraph 305, Premcor may use, without further restriction or limitation, up to five percent (5%) of the SO_2 emission reductions achieved through compliance with this Addendum as emission reduction credits for netting and/or offsets in any NSR Permit after the Date of Entry of this Addendum, provided, however, that such new or modified unit is for purposes of compliance with Clean Fuels requirements and that such new or modified source meets the definition of a "Netting Unit" under Paragraph 301. Premcor may use up to an additional five percent (5%) of the SO_2 emission reductions achieved through its compliance with this Addendum as emission reduction credits for netting and/or offsets in any NSR Permit after the Date of Entry of this Addendum only to the extent that such emission reductions were generated by a "Netting Unit" and will be used for a new or modified source that meets the definition of a "Netting Unit;" provided however that, to the extent that Premcor uses any SO_2 emission reduction credits from the additional five percent (5%) of the SO_2 emission reductions achieved through its compliance with this Addendum pursuant to this sentence, then the quantity of credits available to Valero pursuant to Paragraph 300 of the Consent Decree shall be reduced by the number of SO_2 emission reduction credits used by Premcor pursuant to this sentence.

301. For purposes of this Part XV, Netting Units shall be defined as follows:

a. Any FCCU that achieves an SO_2 concentration of 25 ppmvd on a 365-day rolling average basis, at 0% oxygen, or such other emission limit as may be established by EPA based upon a percentage reduction in SO_2 emissions, as specifically authorized in Part VI of this Addendum;

b. Heaters and boilers that either combust fuel gas containing less than 0.1 grams of hydrogen sulfide per dry standard cubic foot of fuel gas or emit SO_2 at less than 20 ppmvd at 0% oxygen, both on a 3-hour rolling average basis; and

c. An SRP that complies with relevant provisions of 40 C.F.R. Part 60, Subpart J.

302. Premcor will submit to EPA annual reports regarding the generation and use of emission reduction credits under this Part XV. The first such report will be submitted by January 31, 2008. Successive reports will be submitted on January 31 of each subsequent year for the duration of this Addendum. Each such report shall contain the following information for each Premcor Refinery, to the extent that emission reduction credits are both generated at such refinery and are limited by this Part:

a. The quantity of credits generated since the Date of Entry of this Addendum and the emission unit(s) generating such credits, the date on which those credits were generated, and the basis for those determinations;

b. The quantity of credits used since the Date of Entry of this Addendum and the emission units to which those credits were applied;

c. To the extent known at the time the report is submitted, the additional units to which credits will be applied in the future and the estimated amount of such credits that will be used for each such unit; and

d. To the extent Premcor will seek to use the additional five percent (5%) of NOx credits provided for in the second sentence in Paragraph 299 and/or the five percent (5%) of SO_2 credits provided for in the first sentence in Paragraph 300, the date by which Clean Fuels are expected to be produced at that Facility and a detailed explanation of why such unit(s) is (are) necessary for the production of Clean Fuels.

303. The provisions of this Part are intended to restrict the quantity of SO_2 and NOx emission reduction credits that may be generated by Premcor as a result of the emission reductions specifically required by this Addendum for use in any netting and/or offsets in any NSR Permit after the Date of Entry of this Addendum. In addition, the provisions of this Part restrict the use of certain

SO_2 and NOx emission reduction credits authorized for generation under this Addendum to projects necessary to the production of Clean Fuels, as defined and in the manner described in this Addendum.

304. Without limitation to the foregoing, nothing in this Addendum is intended to contravene, impair, be inconsistent with or otherwise restrict compliance options available to Premcor under any SIP to demonstrate compliance with any emission limitation or other standard applicable to the Premcor Refineries, including without limitation any provision established or imposed under an applicable SIP governing intra-facility emission trading.

305. Nothing in this Part XV shall affect the validity of permits issued or permit applications made prior to the Date of Lodging, including any contemporaneous netting analyses in such permits and/or applications. The following shall apply to all such permits and permit applications:

a. Emission reduction credits and/or offsets used by or for units that were permitted, constructed/modified and began operation before October 31, 2006, shall not affect the amount of credits and/or offsets available for Premcor's use under Paragraphs 299 and 300.

b. Emission reduction credits and/or offsets used by or for units that were permitted but did not begin operation before November 10, 2006, shall not affect the amount of credits and/or offsets available for Premcor's use under Paragraphs 299 and 300.

c. Emission reduction credits and/or offsets used by or for units that were not permitted before October 31, 2006, shall affect the amount of credits and/or offsets available for Premcor's use under Paragraphs 299 and 300.

For purposes of Paragraph 305(c), the effect of such emission reduction credits and/or offsets shall be to reduce the amount of credits and/or offsets available for Premcor's use under Paragraphs 299 and 300 as applicable to such Refinery. Such reduction of available credits and/or offsets will be for non-Clean Fuels projects and/or for Clean Fuels projects, as appropriate. If such reductions exceed the amount available under Paragraphs 299 and/or 300, the amount available for Premcor's use under these paragraphs shall be 0.0. For example, if a refinery generates 500 tons of SO_2 emissions reduction

credits through compliance with the Addendum, it would have 50 tons available for use under Paragraph 300 [5% of 500 tons for general projects plus 5% of 500 tons for Clean Fuels projects]. If 30 tons of reductions were used in the existing permitting actions for a Clean Fuels project, such refinery would have 0 tons of available credits to use for Clean Fuels projects and 20 tons available for general projects under Paragraph 300 of the Addendum; but if 70 tons of reductions were so used, such refinery would have 0 tons of credits available under Paragraph 300.

306. Reserved.

XVI. GENERAL RECORDKEEPING, RECORD RETENTION AND REPORTING

307. Premcor shall retain all records required to be maintained in accordance with this Addendum for a period of five (5) years or until Termination, whichever is longer, unless applicable regulations require the records to be maintained longer.

308. Following the first full calendar quarter after the Date of Entry of the Addendum, Premcor shall submit to EPA, within thirty (30) days after the end of such calendar quarter, and semiannually thereafter during the life of this Addendum a progress report ("Progress Report") covering each refinery owned and operated by Premcor. Each Progress Report shall be certified in accordance with Paragraph 309 and shall contain, for each such refinery, as applicable, the following:

a. progress report on the implementation of the requirements of Parts IV through XII of this Addendum;

b. a summary of emissions data that is specifically required by Parts IV through XII of this Addendum for the calendar quarter;

c. a description of any problems anticipated with respect to meeting the compliance programs of Parts IV through XII of this Addendum;

d. a description of implementation activity for all environmentally beneficial projects; and

e. any such additional matters as Premcor believes should be brought to the attention of the United States, EPA and/or the appropriate Plaintiff-Intervener.

309. To the extent that any provision of this Addendum specifically requires that any notice, report or other submission must be certified, such submissions shall contain the following certification. Such certification may be signed by the refinery manager or his/her designee, as provided in writing by the refinery manager, provided the designee is a company employee with responsibilities related to environmental management or compliance.

> "I certify under penalty of law that this information was prepared under my direction or supervision in accordance with a system designed to ensure that qualified personnel properly gather and evaluate the information submitted. Based on my directions and my inquiry of the person(s) who manage the system, or the person(s) directly responsible for gathering the information, he information submitted is, to the best of my knowledge and belief, true, accurate, and complete."

XVII. PENALTY

310. Within thirty (30) calendar days of the Date of Entry, Premcor shall pay a civil penalty, in the aggregate, of $4,250,000 as follows: (i) $2,750,000 to the United States, of which $40,000 will be a civil penalty paid to the EPA Hazardous Substances Superfund; (ii) $800,000 to Plaintiff-Intervener, the State of Ohio; and (iii) $700,000 to Plaintiff-Intervener, Memphis Shelby County Health Department.

311. Premcor's payment of civil penalty monies to the United States shall be made by Electronic Funds Transfer ("EFT") to the United States Department of Justice, in accordance with current EFT procedures, referencing the USAO File No. and DOJ Case Number 90-5-2-1-06811/1, and the civil action case name and case number of the United States District Court for the Western District of Texas. The costs of such EFT shall be Premcor's responsibility. Payment shall be made in accordance with instructions provided to Premcor by the Financial Litigation Unit of the U.S. Attorney's office for the Western District of Texas. Any funds received after 11:00 a.m. (est) shall be credited on the next business day. Premcor shall provide notice of payment, referencing the USAO

File No. and DOJ Case Number, and the civil action case name and case number to the Department of Justice and to EPA, as provided in Paragraph 376 (Notice).

312. – 312C. Reserved.

312D. Premcor's payment of civil penalty monies to the State of Ohio shall be made by two corporate checks, as follows: one in the amount of $640,000, and the second in the amount of $160,000 with the notation that it is for "State of Ohio School Bus Fund (Fund 5CD)." Both checks shall be made payable to the "Treasurer, State of Ohio" and delivered to the attorneys for the State of Ohio:

Martha Sexton, or her successor, Paralegal
Office of the Attorney General of Ohio
Environmental Enforcement Section
30 East Broad Street, 25th Floor
Columbus, OH 43215-3400

312E. Premcor's payment of civil penalty monies to the Memphis Shelby County Health Department shall be made by corporate check made payable to "Memphis Shelby County Health Department" and delivered to:

Robert Rogers, P.E.
Technical Manager
Memphis & Shelby County Health Department
Pollution Control Section
814 Jefferson Avenue
Memphis, TN 38105

313. Reserved.

314. Upon the Date of Entry, this Addendum shall constitute an enforceable judgment for purposes of post-judgment collection in accordance with Rule 69 of the Federal Rules of Civil Procedure, the Federal Debt Collection Procedure Act, 28 U.S.C. § 3001-3308, and other applicable federal authority. The United States and the Plaintiff-Interveners shall be deemed judgment creditors for purposes of collection of any unpaid amounts of the civil and stipulated penalties and interest.

315. No amount of the civil penalty to be paid by Premcor shall be used to reduce its federal or state tax obligations.

XVIII. RESERVED

XIX. SUPPLEMENTAL/BENEFICIAL ENVIRONMENTAL PROJECTS

A. Facility/Community-Specific Supplemental/Beneficial Environmental Projects

316. Premcor shall implement the following Supplemental Environmental Projects ("SEPs") in accordance with the timetables and requirements set forth in this Part. In implementing the SEPs in this Part, Premcor shall spend no less than a total of $4,250,000. In the event that Premcor completes any of the SEPs identified in this Paragraph but does not expend the minimum specified amount for such SEP, Premcor may propose for EPA approval either (i) an alternative SEP, or (ii) to transfer the remaining funds to an existing SEP.

a. Port Arthur.

(1) Community-Based Health Project: Premcor shall implement at the Gulf Coast Health Center a program to enhance the Center's resources for the diagnosis and treatment of asthma, respiratory, cardio-pulmonary, or other illnesses, ailments, or health impacts that may be caused or exacerbated by exposure to air pollutants. Within one year of the Date of Entry of this Addendum, Premcor shall submit a Statement of Work ("SOW"), including a schedule for the completion of this SEP, that shall be subject to approval by EPA. Premcor shall spend not less than $1,000,000 on this SEP.

(2) Community Air Monitoring Project: Premcor shall acquire and place into operation a mobile air monitoring van, which shall be operated for the use and benefit of the Jefferson County Local Emergency Planning Committee ("LEPC"), to, inter alia, monitor and respond to emission events. Premcor shall use best efforts to coordinate with the LEPC regarding the implementation of this SEP. Within one year of the Date of Entry of this Addendum, Premcor shall submit a SOW, including a schedule and an estimated cost for the acquisition and operation of the mobile air monitoring van, that shall be subject to review by the LEPC and to approval by EPA.

Premcor shall complete implementation of the approved SOW by no later than three years from the Date of Entry. Premcor shall spend not less than $50,000 on this SEP.

(3) Community School Shelter-in-Place Project: Premcor shall install at the Booker T. Washington Elementary School and the Memorial 9th Grade Center School in Port Arthur a "shelter-in-place" air control system to detect, isolate, and/or filter air pollutants and/or emissions that may result from emission events in the Port Arthur area. Premcor shall use best efforts to coordinate with the appropriate school authority regarding the implementation of this SEP. Within one year of the Date of Entry of the Addendum, Premcor shall submit a SOW, including a schedule and an estimated cost for each shelter-in-place system and any related improvements, that shall be subject to review by the appropriate school authority and to approval by EPA. Premcor shall complete implementation of the approved SOW by no later than four years from the Date of Entry. Premcor shall spend not less than $500,000 on this SEP.

(4) Community Low Income Housing Emission Reduction Project: Premcor shall provide new low-NOx-emitting natural gas or electric water heaters to replace existing higher-emitting water heaters in low-income residences in the Port Arthur area. Within ninety (90) days of the Date of Entry of this Addendum, Premcor shall deposit not less than $50,000 into an escrow account established by Premcor for the purpose of implementing this SEP. Premcor shall, upon the written request of the South East Texas Regional Planning Commission, disburse such funds and any interest as directed by the Commission for purposes of implementing this SEP through the Commission's "Lighthouse Program." Premcor shall include an estimate of the anticipated emissions reductions resulting from this SEP in Premcor's reporting pursuant to Paragraph 318.c.

(5) Port Arthur VOC Reduction Project: Premcor shall install controls on unregulated and/or uncontrolled atmospheric relief vents at the Port Arthur Refinery that will route emissions from such vents to a control device to eliminate or significantly reduce the potential for

fugitive VOC emissions. This project will be completed by no later than December 31, 2009. Premcor shall spend not less than $675,000 on this SEP.

b. Lima.

(1) City of Lima Traffic Signal Synchronization Study: Premcor shall develop and implement a Traffic Signal Synchronization study to optimize traffic flow in the City of Lima to reduce emissions from preventable vehicle idling resulting from inefficient traffic flow. Within ninety (90) days of Date of Entry of this Addendum, Premcor shall deposit not less than $200,000 into an escrow account established by Premcor for the purpose of implementing this SEP. Premcor shall, upon written request by the City of Lima, disburse such funds and any interest as directed by the City for the purpose of implementing this SEP. Premcor shall include an estimate of the anticipated emissions reductions and health benefits resulting from this SEP in Premcor's reporting pursuant to Paragraph 318.c.

(2) Lima VOC Reduction Project: Premcor shall install controls on unregulated and/or uncontrolled atmospheric relief vents at the Lima Refinery that will route emissions from such vents to a control device to eliminate or significantly reduce the potential for fugitive VOC emissions. This project will be completed by no later than December 31, 2009. Premcor shall spend not less than $675,000 on this SEP.

(3) Lima Infrared Camera Imaging Project. Premcor shall perform a SEP designed to demonstrate the use of infrared imaging equipment to identify emissions from leaking components and other sources of fugitive VOC emissions at the Lima Refinery (the "Lima Infrared Camera Imaging Project"). Within ninety (90) days of the Date of Entry of this Addendum, Premcor shall submit a plan for the Lima Infrared Camera Imaging Project. The plan shall include a description of the project's overall objective(s), the procedures to be followed, a project budget (detailing expected equipment costs, laboratory costs, and contractor costs), and a schedule for performing and completing the project. The plan shall include procedures for the use of the infrared imaging equipment for a

period of not less than one year to, inter alia, (i) periodically "sweep" the Lima Refinery to identify fugitive sources of VOC emissions from regulated and unregulated sources, and (ii) monitor valves, tanks, and other equipment to identify and minimize upsets and other uncontrolled VOC emissions during periods of startup and shutdown. Premcor shall include in its reporting pursuant to Paragraph 318.c an estimate of the emissions benefits associated with the Lima Infrared Camera Imaging Project. Premcor shall spend not less than $50,000 on this SEP.

(4) State and Local SEPs:

(i) State Particulate Matter Speciation Monitoring and Sampling Project: Within ninety (90) days of the Date of Entry of this Addendum, Premcor shall transfer no less than $200,000 to the Lake Michigan Air Directors Consortium to support PM 2.5 speciation monitoring and source sampling.

(ii) State Diesel Emission Reduction Project: Within ninety (90) days of the Date of Entry of this Addendum, Premcor shall transfer no less than $50,000 to the Ohio Environmental Council for the installation of diesel retrofit technologies to reduce emissions of particulates and ozone precursors from municipal trucks and/or buses.

c. Memphis:

(1) The Memphis Infrared Camera Imaging Project. Premcor shall perform a SEP designed to demonstrate the use of infrared imaging equipment to identify emissions from leaking components and other sources of fugitive VOC emissions at the Memphis Refinery (the "Memphis Infrared Camera Imaging Project"). Within ninety (90) days of the Date of Entry of this Addendum, Premcor shall submit a plan for the Memphis Infrared Camera Imaging Project. The plan shall include a description of the project's overall objective(s), the procedures to be followed, a project budget (detailing expected equipment costs, laboratory costs, and contractor costs), and a schedule for performing and completing the project. The plan shall include procedures for the use of the infrared imaging equipment for a period of not less than one year to, inter alia, (i) periodically "sweep" the

Memphis Refinery to identify fugitive sources of VOC emissions from regulated and unregulated sources, and (ii) monitor valves, tanks, and other equipment to identify and minimize upsets and other uncontrolled VOC emissions during periods of startup and shutdown. Premcor shall include in its reporting pursuant to Paragraph 318.c an estimate of the emissions benefits associated with the Memphis Infrared Camera Imaging Project. Premcor shall spend not less than $50,000 on this SEP.

(2) Memphis Wastewater Treatment H_2S Reduction Project: Premcor shall, in conjunction with the City of Memphis, purchase and install vapor controls and undertake such other measures as are necessary to reduce or eliminate H_2S off-gassing from the City of Memphis wastewater treatment works. Within 270 days from the Date of Entry of this Addendum, Premcor shall submit a Statement of Work, including a schedule and identifying the work to be performed by Premcor to implement this SEP, that shall be subject to review by the City of Memphis and approval by EPA. Premcor shall coordinate with the City of Memphis for the completion this SEP by no later than December 31, 2009. Premcor shall spend not less than $450,000 on this SEP

(3) State and Local SEPs:

(i) City of Memphis Ozone Reduction Project: Within ninety (90) days of the Date of Entry of this Addendum, Premcor shall transfer $250,000 to the Memphis Area Transit Authority ("MATA") to subsidize reduced bus fare services provided by MATA on high ozone, or "ozone alert," days to reduce the number of commuter passenger vehicles in use on high-ozone days in the Memphis area.

(ii) Port of Memphis Emission Reduction Project: Within ninety (90) days of the Date of Entry of this Addendum, Premcor shall transfer $50,000 to the International Port of Memphis for the installation of diesel retrofit technologies to reduce emissions of particulates and ozone precursors from diesel engines and vehicles at the Port.

317. Reserved.

B. General Project Requirements

318. a. Premcor is responsible for the satisfactory completion of the projects required under this Addendum in accordance with this Part XIX. Upon completion of each project set forth in Paragraphs 316, Premcor will submit to EPA and the applicable Plaintiff-Intervener a cost report certified as accurate under penalty of perjury by a responsible corporate official. If Premcor does not expend the project-specific amounts required under Paragraphs 316, Premcor will pay a stipulated penalty equal to the difference between the amount expended (as demonstrated in the certified cost report(s)) and such project-specific required amount. The stipulated penalty will be paid as provided in Paragraph 321 (Payment of Stipulated Penalties).

b. By signing this Addendum and except with respect to Paragraph 316, Premcor certifies that it is not required, and has no liability under any federal, state, regional or local law or regulation or pursuant to any agreements or orders of any court, to perform or develop any of the projects identified in this Part XIX. Premcor further certifies that it has not applied for or received, and will not in the future apply for or receive: (1) credit as a Supplemental Environmental Project or other penalty offset in any other enforcement action for the projects set forth in this part, except with respect to Paragraph 316; (2) credit for any emissions reductions resulting from the projects set forth in this part in any federal, state, regional or local emissions trading or early reduction program; or (3) a deduction from any federal, state, regional, or local tax based on its participation in, performance of, or incurrence of costs related to the projects set forth in this part.

c. Premcor will include in each report required by Paragraph 308 a description of its progress under this Part XIX. In addition, the report required by Paragraph 308 of this Addendum for the period in which each project identified in Paragraphs 316 and/or 317 is completed will contain the following information with respect to such project(s):

i. A detailed description of each project as implemented;

ii. A brief description of any significant operating problems encountered, including any that had an impact on the environment, and the solutions for each problem;

iii. Certification that each project has been fully implemented pursuant to the provisions of this Addendum; and

iv. A description of the environmental and public health benefits resulting from implementation of each project (including quantification of the benefits and pollutant reductions, if feasible).

v. Premcor agrees that it must clearly indicate that these projects are being undertaken as part of the settlement of an enforcement action for alleged violations of the Clean Air Act and corollary state statutes in any public statements regarding these projects.

XX. STIPULATED PENALTIES

319. Premcor shall pay stipulated penalties to the United States or the appropriate Plaintiff-Intervener, where appropriate, for each failure by Premcor to comply with the terms of this Addendum; provided, however, that the United States or the appropriate Plaintiff-Intervener may elect to bring an action for contempt in lieu of seeking stipulated penalties for violations of this Addendum. For each violation, the amounts identified below shall apply on the first day of violation and shall be calculated for each incremental period of violation (or portion thereof). Stipulated penalties under subparagraphs 320(d) and 320(e) shall not start to accrue unless and until there is noncompliance with the concentration-based, rolling average emission limits identified in those paragraphs for 5% or more of the applicable unit's operating time during any calendar quarter. For those provisions where a stipulated penalty of either a fixed amount or 1.2 times the reasonable economic benefit of Premcor's delayed compliance is specifically identified below as available, the decision of which alternative to seek shall rest exclusively with the discretion of the United States and the appropriate Plaintiff-Intervener. In no event shall any penalty assessed against Premcor exceed the maximum civil penalty

that may be assessed under the Clean Air Act 42 U.S.C § 7413 for any individual violation of this Addendum.

320. The following provisions are not intended, nor shall be construed, to be duplicative. Instead, any action or omission by Premcor that constitutes noncompliance with this Addendum shall give rise to a single stipulated penalty, hereunder, assessable to Premcor, except to the extent that any stipulated penalty provision specifically provides for additional penalties for continuing violations.

a. Requirements for NOx emission reductions from Covered Heaters and Boilers (Part IV):

i. Failure to achieve the interim emission reduction goals in accordance with Section IV.B: $100,000 per quarter.

ii. Failure to achieve the final emission reduction goals in accordance with Section IV.C or IV.G: $200,000 per quarter.

b. Failure to submit any written deliverable required under this Addendum:

Period of Delay	Penalty per Day
1st day through 30th day after deadline	$200
31st day through 60th day after deadline	$500
Beyond 60th day after deadline	$1,000

c. Failure to conduct any performance test, to install, calibrate and operate a CEMS or COMS or to establish PEMS operating parameters in accordance with Appendix S:

Period of Delay	Penalty per Day
1st day through 30th day after deadline	$500
31st day through 60th day after deadline	$1,000
Beyond 60th day after deadline	$2,000 or an amount equal to 1.2 times the economic benefit of delayed compliance, whichever is greater.

d. Requirements for NOx emission reduction from FCCUs (Part V):

Failure to meet emission limits established pursuant to Part V: $750 for each calendar day in a calendar quarter on which the specified 7-day rolling average exceeds the applicable limit; $2,500 for each calendar day in a calendar quarter on which the specified 365-day rolling average exceeds the applicable limit.

e. Requirements for SO_2 emission reductions from FCCUs (Part VI):

i. Failure to meet final emission limits for the FCCU exhaust gas at each refinery: $750 for each calendar day in a calendar quarter on which the specified 7-day rolling average exceeds the applicable limit; $2,500 for each calendar day in a calendar quarter on which the specified 365-day rolling average exceeds the applicable limit.

ii. For failure to comply with any requirement of the SO_2 Reducing Catalyst Additives protocol, as set forth in Appendix E, including submission of the Demonstration Report, per unit, per day:

Period of Delay or Non-Compliance	Penalty per day
1st through 30th day after deadline	$1,000
31st through 60th day after deadline	$1,500
Beyond 60th day after deadline	$2,000 or an amount equal to 1.2 times the economic benefit of the delayed compliance, whichever is greater

iii. For failure to comply with the plan required by Paragraph 85 for operating the FCCUs in the event of a Hydrotreater Outage, per unit, per day:

Period of Delay	Penalty per day
1st through 30th day after deadline	$250
31st through 60th day after deadline	$1,000
Beyond 60th day after deadline	$2,000 or an amount equal to 1.2 times the economic benefit of delayed compliance, whichever is greater

f. Requirements for CO and particulate emissions controls for FCCUs (Part VII):

i. Failure to comply with CO emission limit: $750 for each calendar day in a calendar quarter on which the specified 1-hour average exceeds the applicable limit.

ii. Failure to comply with particulate emission limit: $3,000 for each calendar day in a calendar quarter on which the Refinery exceeds the specified limit.

g. Requirements for NSPS applicability to FCCU regenerators (Part VIII):

i. Failure to comply with NSPS emission limits, as required by Part VIII. per day per emission limit per emission point.

Period of Non-Compliance	Penalty per day
1st through 30th day	$2,500
Beyond 31st day	$5,000 or an amount equal to 1.2 times the economic benefit of delayed compliance, whichever is greater

ii. For burning Fuel Oil in a manner inconsistent with the requirements of Paragraphs 113 and 114 per unit, per day:

Period of Non-Compliance	Penalty per day
1st through 30th day	$1,750
Beyond 31st day	$5,000 or an amount equal to 1.2 times the economic benefit of delayed compliance, whichever is greater

iii. For failure to comply with the NSPS Subpart J emission limits under Paragraphs 221 or 222 per unit, per day in a calendar quarter:

Period of Non-Compliance	Penalty per day
1st through 30th day	$1,000
31st through 60th day	$2,000
Over 60 days	$3,000 or an amount equal to 1.2 times the economic benefit of delayed compliance, whichever is greater

iv. For failure to eliminate, control, and/or include and monitor all sulfur pit emissions in accordance with the requirements of Paragraph 226 , per unit, per day:

Period of Non-Compliance	Penalty per day
1st through 30th day	$1,000
31st through 60th day	$1,750
Beyond 60th day	$4,000 or an amount equal to 1.2 times the economic benefit of delayed compliance whichever is greater

v. For failure to comply with the Preventive Maintenance and Operation Plan under Paragraph 229 per refinery, per day:

Period of Delay or Non-Compliance	Penalty per day
1st through 30th day after deadline	$500
31st through 60th day	$1,500
Over 60 days	$2,000

vi. Each rolling 12-hour average of sulfur dioxide emissions from any SRP in excess of the limitation at 40 C.F.R. § 60.104(a)(2)(i) that is not attributable to Startup, Shutdown, or Malfunction of the SRP, or that is not attributable to Malfunction of the associated TGTU:

Number of rolling 12-hr average exceedances within calendar day	Penalty per rolling 12-hr average exceedance
1 – 12	$350
Over 12	$750

vii. Operation of the SRP during Scheduled Maintenance of its associated TGTU (except that this paragraph shall not apply during periods in which Premcor is engaged in the Shutdown of an SRP for, or Startup of an SRP following, Scheduled Maintenance of the SRP): $25,000 per SRP per day per refinery.

h. Requirements for Benzene Waste NESHAP program enhancements (Part X):

i. Failure to timely conduct audit or compliance review and verification under Section X.C and X.G: $7,500 per month per review/audit.

ii. Failure to timely sample under Section X.K: $250 per week, per stream or $15,000 per quarter, per stream (whichever amount is greater, but not to exceed $75,000 per refinery per quarter).

iii. Failure to timely install carbon canister under Section X.E: $1,000 per day per canister.

iv. Failure to timely replace carbon canister under Section X.E: $1,000 per day per canister

v. Failure to perform monitoring under Section X.L: $500 per monitoring event.

vi. Failure to develop and timely implement training program under Section X.I: $10,000 per quarter per refinery

vii. Failure to mark segregated stormwater drains under Section X.L: $1,000 per week per drain

viii. If it is discovered by an EPA or state investigator or inspector, or their agent, that Premcor failed to include all benzene waste streams in its TAB, for each waste stream that is:

Less than 0.03 Mg/yr -	$250 per stream;
Between 0.03 and 0.1 Mg/yr -	$1,000 per stream;
Between 0.1 Mg/yr and 0.5 Mg/yr -	$5,000 per stream;
Greater than .5 Mg/yr -	$10,000 per stream.

i. Requirements for Leak Detection and Repair program enhancements (Part XI):

i. Failure to have written LDAR program under Section XI.B: $3,500 per week.

ii. Failure to implement the training program under Section XI.C: $10,000 per month, per program.

iii. Failure to timely conduct internal or external audit under Section XI.D: $5,000 per month per audit.

iv. Failure to timely implement internal leak definition under Section XI.G: $10,000 per month per process unit.

v. Failure to develop and timely implement initial attempt at repair program under Section XI.I: $10,000 per month.

vi. Failure to implement and begin more frequent monitoring program under Section XI.J: $10,000 per month per process unit.

vii. Failure to timely monitor under Section XI.J: $10,000 per week per process unit.

viii. Failure to have dataloggers and electronic storage under Section XI.K: $5,000 per month per refinery.

ix. Failure to timely establish LDAR accountability under Section XI.M: $3,750 per week per refinery.

x. Failure to establish new equipment standards under Section XI.N: $1,000 per month.

xi. Failure to conduct calibration drift assessment or to remonitor components (if and as required) under Section XI.O: $100 per missed event per day per refinery.

xii. Failure to attempt the drill and tap method under Section XI.Q: $5,000 per component.

xiii. For failure to comply with the requirement for chronic leakers set forth in Paragraph 212 : $5,000 per valve.

xiv. If it is discovered by an EPA or state investigator or inspector, or their agent, that Premcor failed to include all required components in its LDAR program: $87.50 per component.

j. Requirements for Permitting (Part XIV):

Failure to timely submit a reasonably or administratively complete permit application:

Period of Delay	Penalty per Day
Days 1-30	$800
Days 31-60	$1,500

Over 60 days	$3,000

k. Requirements for Supplemental/Beneficial Environmental Projects (Part IX):

For Failure to timely complete implementation of the projects required by Part IX:

Period of Non-Compliance	Penalty per day
1st through 30th day after deadline	$1,000
31st through 60th day after deadline	$1,500
Beyond 60th day after deadline	$2,000.

l. Reserved.

m. Requirement to Escrow Stipulated Penalties: Failure to escrow stipulated penalties, as required by Paragraph 322 of this Part: $1,250 per day, and interest on the amount overdue at the rate specified in 28 U.S.C. § 1961(a).

n. As to any failure to complete an obligation pursuant to this Addendum that does not otherwise have a specified stipulated penalty, the United States, relevant Plaintiff-Intervener and Premcor may reach agreement on a stipulated penalty amount and such agreed stipulated penalty may be assessed and paid pursuant to this Part XX.

o. For failure to perform a CERCLA/EPCRA Compliance Review, submit a CERCLA/EPCRA Compliance Review Report, or perform corrective actions, as required by Paragraph 241a, per refinery:

Period of Non-Compliance	Penalty per day
1st through 30th day after deadline	$500
31st through 60th day after deadline	$1,500
Beyond 60th day after deadline	$3,000

321. Premcor shall pay such stipulated penalties upon written demand by the United States or the appropriate Plaintiff-Intervener no later than sixty (60) days after Defendant receives such demand. Demand from either the United States or the appropriate Plaintiff-Intervener shall be deemed

a demand from both, but the United States and the appropriate Plaintiff-Intervener shall consult with each other prior to making a demand. Stipulated penalties owed by Premcor shall be paid 50% to the United States and 50% to the appropriate Plaintiff-Intervener. Stipulated penalties shall be paid in the manner set forth in Part XVII unless the payment to the United States is less than $10,000, in which case such payment shall be certified or company check, payable to the appropriate United States Attorneys Office. A demand for the payment of stipulated penalties will identify the particular violation(s) to which it relates, the amounts demanded for each violation (as can be best estimated), the calculation method underlying the demand and the grounds upon which the demand is based. After consultation with each other, the United States and the appropriate Plaintiff-Intervener may, in their unreviewable discretion, waive payment of any portion of stipulated penalties that may accrue under this Addendum. Where a single event triggers more than one stipulated penalty provision in this Addendum, only one such provision will apply.

322. Should Premcor dispute its obligation to pay part or all of a stipulated penalty, it may avoid the imposition of the stipulated penalty for failure to pay a penalty due to the United States or the appropriate Plaintiff-Intervener, by placing the disputed amount demanded by the United States or the Plaintiff-Intervener in a commercial escrow account pending resolution of the matter and by invoking the Dispute Resolution provisions of Part XXIII within the time provided in Paragraph 321 for payment of stipulated penalties. If the dispute is thereafter resolved in Premcor's favor, the escrowed amount plus accrued interest shall be returned to Premcor, otherwise the United States or the appropriate Plaintiff-Intervener shall be entitled to the escrowed amount that was determined to be due by the Court plus the interest that has accrued on such amount, with the balance, if any, returned to Premcor.

323. Nothing in this Addendum shall prevent the United States or the appropriate Plaintiff-Intervener from pursuing a contempt action against Premcor in lieu of demanding stipulated penalties hereunder and requesting that the Court order specific performances of the terms of this Addendum.

Nothing in this Addendum authorizes the appropriate Plaintiff-Intervener to take action or make any determinations under this Addendum regarding Premcor refineries that are outside that Plaintiff-Intervener's state or that are not subject to this Addendum.

324. The United States and the appropriate Plaintiff-Intervener reserve the right to pursue any other non-monetary remedies to which they are legally entitled, including but not limited to injunctive relief for violations of the Addendum. Where a violation of this Addendum is also a violation of the Clean Air Act, its regulations or federally enforceable state law, regulation or permit, the United States (or the appropriate Plaintiff-Intervener) will not seek civil penalties where it already has demanded and secured stipulated penalties for the same act or omission, nor will the United States (or the appropriate Plaintiff-Intervener) demand stipulated penalties for a violation of the Addendum if it has commenced litigation under the Clean Air Act for the same acts or omissions. Where a violation of this Addendum is also a violation of state law, regulation or a permit, the Plaintiff-Interveners will not seek civil or administrative penalties where they have already demanded and secured stipulated penalties for the same acts or omissions, nor will the Plaintiff-Interveners demand stipulated penalties for a violation of the Addendum if it has commenced litigation under the Clean Air Act for the same acts or omissions.

XXI. RIGHT OF ENTRY

325. Any authorized representative of EPA or a Plaintiff-Intervener, including their independent contractors, upon presentation of credentials, shall have a right of entry upon the premises of the Premcor Refineries at any reasonable time for the purpose of monitoring compliance with the provisions of this Addendum, including inspecting plant equipment, and inspecting and copying all records maintained as required by this Addendum. Nothing in this Addendum shall limit the authority of EPA to conduct tests and inspections under Section 114 of the Clean Air Act, 42 U.S.C. § 7414, or any other statutory or regulatory provision.

XXII. FORCE MAJEURE

326. If any event occurs which causes or may cause a delay or impediment to performance in complying with any provision of this Addendum (*e.g.* would require operation in an unsafe manner), and which Premcor believes qualifies as an event of force majeure, Premcor shall notify the United States and Plaintiff-Intervener in writing as soon as practicable, but in any event within forty-five (45) business days of when Premcor first knew of the event or should have known of the event by the exercise of due diligence. In this notice Premcor shall specifically reference this paragraph of this Addendum and describe the anticipated length of time the delay may persist, the cause or causes of the delay, and the measures taken or to be taken by Premcor to prevent or minimize the delay and the schedule by which those measures will be implemented. Premcor shall adopt all reasonable measures to avoid or minimize such delays.

327. Failure by Premcor to substantially comply with the notice requirements of Paragraph 326, as specified above, shall render this Part voidable by the United States, after an opportunity for consultations with the Plaintiff-Intervener, as to the specific event for which Premcor has failed to comply with such notice requirement. If so voided, it shall be of no effect as to the particular event involved.

328. The United States, after an opportunity for consultation with the Plaintiff-Intervener, shall notify Premcor in writing regarding their claim of a delay or impediment to performance within forty-five (45) business days of receipt of the Force Majeure notice provided under Paragraph 326.

329. If the United States, after an opportunity for consultation with the Plaintiff-Intervener, agrees that the delay or impediment to performance has been or will be caused by circumstances beyond the control of Premcor including any entity controlled or contracted by it, and that it could not have prevented the delay by the exercise of due diligence, the parties shall stipulate to an extension of the required deadline(s) for all requirement(s) affected by the delay by a period equivalent to the delay actually caused by such circumstances, or such other period as may be appropriate in light of the

circumstances. Such stipulation may be filed as a modification to this Addendum by agreement of the parties pursuant to the modification procedures established in this Addendum. Premcor shall not be liable for stipulated penalties for the period of any such delay.

330. If the United States and appropriate Plaintiff-Intervener do not accept Premcor's claim of a delay or impediment to performance or Event of Force Majeure pursuant to this Addendum, then Premcor must submit the matter to this Court for resolution to avoid payment of stipulated penalties, by filing a petition for determination with this Court. In the event that the United States and Plaintiff-Intervener do not agree, the position of the United States on the Force Majeure claim shall become the final Plaintiffs' position. Once Premcor has submitted this matter to this Court, the United States and appropriate Plaintiff-Intervener shall have twenty (20) business days to file a response to the petition. If Premcor submits the matter to this Court for resolution and the Court determines that the delay or impediment to performance has been or will be caused by circumstances beyond the control of Premcor, including any entity controlled or contracted by it, and that it could not have prevented the delay by the exercise of due diligence, Premcor shall be excused as to that event(s) and delay (including stipulated penalties) for all requirements affected by the delay for a period of time equivalent to the delay caused by such circumstances or such other period as may be determined by the Court.

331. Premcor shall bear the burden of proving that any delay of any requirement(s) of this Addendum was caused by or will be caused by circumstances beyond its control, including any entity controlled or contracted by it, and that it could not have prevented the delay by the exercise of due diligence. Premcor shall also bear the burden of proving the duration and extent of any delay(s) attributable to such circumstances. An extension of one compliance date based on a particular event may, but does not necessarily, result in an extension of a subsequent compliance date or dates. Unanticipated or increased costs or expenses associated with the performance of obligations under this Addendum shall not constitute circumstances beyond the control of Premcor.

332. Notwithstanding any other provision of this Addendum, this Court shall not draw any inferences nor establish any presumptions adverse to any party as a result of Premcor delivering a notice of Force Majeure or the parties' inability to reach agreement.

333. As part of the resolution of any matter submitted to this Court under this Part, the parties by agreement, or this Court by order, may in appropriate circumstances extend or modify the schedule for completion of work under this Addendum to account for the delay in the work that occurred as a result of any delay or impediment to performance agreed to by the United States and the appropriate Plaintiff-Intervener or approved by this Court. Premcor shall be liable for stipulated penalties for its failure thereafter to complete the work in accordance with the extended or modified schedule, except to the extent that such schedule is further modified, extended or otherwise affected by a subsequent force majeure event under this Part XXII.

XXIII. DISPUTE RESOLUTION

334. The dispute resolution procedure provided by this Part shall be available to resolve all disputes arising under this Addendum, except as otherwise provided in Part XXII regarding Force Majeure, provided that the party making such application has made a good faith attempt to resolve the matter with the other party.

335. The dispute resolution procedure required herein shall be invoked upon the giving of written notice by one of the parties to this Addendum to another advising of a dispute pursuant to this Part. The notice shall describe the nature of the dispute, and shall state the noticing party's position with regard to such dispute. The party or parties receiving such a notice shall acknowledge receipt of the notice and the parties shall expeditiously schedule a meeting to discuss the dispute informally not later than fourteen (14) days from the receipt of such notice.

336. Disputes submitted to dispute resolution shall, in the first instance, be the subject of informal negotiations between the parties. Such period of informal negotiations shall not extend beyond thirty (30) calendar days from the date of the first meeting between representatives of the

United States, the appropriate Plaintiff-Intervener and Premcor, unless the parties' representatives agree to shorten or extend this period.

337. In the event that the parties are unable to reach agreement during such informal negotiation period, the United States and the appropriate Plaintiff-Intervener shall provide Premcor with a written summary of their collective position regarding the dispute. The position advanced by the United States and Plaintiff-Intervener shall be considered binding unless, within forty-five (45) calendar days of Premcor's receipt of the written summary of the United States and Plaintiff-Intervener's position, Premcor files with this Court a petition which describes the nature of the dispute. The United States shall respond to the petition within forty-five (45) calendar days of filing.

338. In the event the United States and the Plaintiff-Intervener make differing determinations or take differing actions that affect Premcor's rights or obligations under this Addendum, then as between the United States and the Plaintiff-Intervener the determination or action of the United States shall control.

339. Where the nature of the dispute is such that a more timely resolution of the issue is required, the time periods set out in this Part may be shortened upon motion of one of the parties to the dispute.

340. Notwithstanding any other provision of this Addendum, in dispute resolution, this Court shall neither draw any inferences nor establish any presumptions adverse to either party as a result of invocation of this Part or the parties' inability to reach agreement.

341. As part of the resolution of any dispute submitted to dispute resolution, the parties by agreement, or this Court by order, in appropriate circumstances, may extend or modify the schedule for completion of work under this Addendum to account for the delay in the work that occurred as a result of dispute resolution. Premcor shall be liable for stipulated penalties for its failure thereafter to complete the work in accordance with the extended or modified schedule, subject to the Force Majeure provisions of Part XXII.

XXIV. EFFECT OF SETTLEMENT

342. This Addendum is not a permit; except as otherwise provided herein, compliance with its terms does not ensure compliance with any applicable federal, state or local laws or regulations governing air quality permitting requirements. Except as otherwise expressly provided herein, nothing in this Addendum shall be construed to be a ruling on, or determination of, any issue related to any Federal, state or local permit.

343. Definitions. For purposes of this Part XXIV (Effect of Settlement), the following definitions apply:

a. "Applicable NSR/PSD Requirements" shall mean: PSD requirements at Part C of Subchapter I of the Act, 42 U.S.C. § 7475, and the regulations promulgated thereunder at 40 C.F.R. §§ 52.21 and 51.166; the portions of the applicable SIPs and related rules adopted as required by 40 C.F.R. §§ 51.165 and 51.166; "Plan Requirements for Non-Attainment Areas" at Part D of Subchapter I of the Act, 42 U.S.C. §§ 7502-7503, and the regulations promulgated thereunder at 40 C.F.R. §§ 51.165 (a) and (b), 40 C.F.R. Part 51, Appendix S, and 40 C.F.R. § 52.24; Title V regulations or permit provisions that implement, adopt or incorporate the specific regulatory requirements identified above; and state or local regulations or permits that implement, adopt, or incorporate the specific federal regulatory requirements identified above.

b. "Applicable NSPS Subparts A and J Requirements" shall mean the standards, monitoring, testing, reporting and recordkeeping requirements, found at 40 C.F.R. §§ 60.100 through 60.109 (Subpart J), relating to a particular pollutant and a particular affected facility, and the corollary general requirements found at 40 C.F.R. §§ 60.1 through 60.19 (Subpart A) that are applicable to any affected facility covered by Subpart J; any Title V regulations that implement, adopt or incorporate the specific regulatory requirements identified above; any applicable, federally-enforceable state or local regulations that implement, adopt, or incorporate the specific federal regulatory requirements identified above, and any Title V permit provisions that implement, adopt or incorporate the specific regulatory

requirements identified above; and any applicable state or local regulations, or permits enforceable by Plaintiff-Interveners that implement, adopt, or incorporate the specific federal regulatory requirements identified above.

c. "Post-Lodging Compliance Dates" shall mean any dates after the Date of Lodging provided in the relevant sections of this Addendum. Post-Lodging Compliance Dates include dates certain (e.g., "December 31, 2004"), dates after Lodging represented in terms of "months after Lodging" (e.g., "Twelve Months after the Date of Lodging"), and dates after Lodging represented by actions taken (e.g., "Date of Certification"). The Post-Lodging Compliance Dates represent the dates by which work is required to be completed or an emission limit is required to be met under the applicable provisions of this Addendum.

344. **Resolution of Liability Regarding the Applicable NSR/PSD Requirements.** With respect to emissions of the following pollutants from the following units, entry of this Addendum shall resolve all civil liability for violations of the Applicable NSR/PSD Requirements resulting from pre-Lodging construction or modification:

A. Emissions of SO_2, from the FCCUs at the Premcor Refineries.

B. Emissions of NOx from the FCCUs at the Premcor Refineries.

C. Emission of NOx and SO_2 from all heaters and boilers at the Premcor Refineries.

345. **Resolution of Liability for PM Emissions Under the Applicable NSR/PSD Requirements.** With respect to emissions of PM from the FCCUs at the Premcor Refineries, when Premcor accepts an emission limit of 0.5 pound PM per 1000 pounds of coke burned (front half only according to Method 5B or 5F, as appropriate) on a 3-hour average basis and demonstrates compliance by conducting a 3-hour performance test representative of normal operating conditions for PM emissions at a particular Refinery, then all civil liability shall be resolved for violations of the Applicable NSR/PSD Requirements relating to PM emissions at the relevant Refinery resulting from pre-Lodging construction or modification of the FCCU at that Refinery.

346. **Resolution of Liability for CO Emissions Under the Applicable NSR/PSD Requirements.** With respect to emissions of CO from the FCCUs at the Premcor Refineries, if and when Premcor accepts an emission limit of 100 ppmvd of CO at 0% O_2 on a 365-day rolling average basis and demonstrates compliance using CEMS at the relevant Refinery, then all civil liability shall be resolved for violations of the Applicable NSR/PSD Requirements relating to CO emissions at the relevant Refinery resulting from pre-Lodging construction or modification of the FCCU for that Refinery.

347. Reserved.

348. **Exclusions from Release Coverage Regarding Applicable NSR/PSD Requirements:** Notwithstanding the resolution of liability in Paragraphs 345-346, nothing in this Addendum precludes the United States and/or the Plaintiff-Interveners from seeking from Premcor injunctive relief, penalties, or other appropriate relief for violations by Premcor of the Applicable NSR/PSD Requirements resulting from: (1) construction or modification that commenced prior to the Date of Lodging of the Addendum, if the resulting violations relate to pollutants or units not covered by the Addendum; or (2) any construction or modification that commences after the Date of Lodging of the Addendum.

349. **Exclusions from Resolution of Liability Under Applicable PSD/NSR Requirements**. Increases in emissions from units covered by this Addendum, where the increases result from the Post-Lodging construction or modification as defined by 40 C.F.R 52.21 of any units within the Premcor Refineries are beyond the scope of the release in Paragraphs 345-346.

350. **Resolution of Liability Regarding Matters on Appendices Q, R, and T.** With respect to the enforcement matters identified in Appendix Q and Appendix R, and with respect to the emission events listed in Appendix T, entry of this Addendum shall resolve all civil liability for the violations identified, alleged or resolved in Appendix Q and Appendix R, and for the emission events

listed in Appendix T, in the manner and to the extent set forth therein, from the date that the claims accrued up to the relevant Post-Lodging Compliance Dates.

351. **Resolution of Liability Regarding Applicable NSPS Subparts A and J Requirements**. With respect to Opacity and emissions of SOx, PM, and CO, as applicable, from all heaters and boilers, SRPs, fuel gas combustion devices, and the FCCUs at the Premcor Refineries, entry of this Addendum shall resolve all civil liability for pre-Lodging violations of the Applicable NSPS Subparts A and J Requirements from the date that the claims accrued up to the relevant Post-Lodging Compliance Dates.

352. **Prior NSPS Applicability Determinations**. Nothing in this Addendum shall affect the status of any FCCU, heater or boiler, fuel gas combustion device, or sulfur recovery plant currently subject to NSPS as previously determined by any federal, state, or local authority or any applicable permit.

353. **Resolution of Liability Regarding Benzene Waste NESHAP Requirements.** Entry of this Addendum shall resolve all civil liability for violations of the statutory and regulatory requirements set forth below in subparagraphs i. through iii. (the "BWON Requirements") that (1) commenced and ceased prior to the Date of Entry of the Addendum; and (2) commenced prior to the Date of Entry of the Addendum and/or continued past the Date of Entry, provided that the events giving rise to such violations are identified by Premcor in its BWON Compliance Review and Verification Report(s) submitted pursuant to Paragraphs 127 and 128 and corrected by Premcor, as required under section X.D.:

i. Benzene Waste NESHAP. The National Emission Standard for Benzene Waste Operations, 40 C.F.R. Part 61, Subpart FF, promulgated pursuant to Section 112(e) of the Act, 42 U.S.C. § 7412(e), including any federal regulation or permit that adopts or incorporates the requirements of Subpart FF by express reference, but only to the extent of such adoption or incorporation; and

ii. Any applicable, federally-enforceable state or local regulations or permits that implement, adopt, or incorporate the specific federal regulatory requirements identified in Paragraph 353.i.

iii. Any applicable state or local regulations or permits enforceable by the Plaintiff-Interveners that implement, adopt, or incorporate the specific federal regulatory requirements identified in Paragraph 353.i.

354. **Resolution of Liability Regarding LDAR Requirements.** Entry of this Addendum shall resolve all civil liability for violations of the statutory and regulatory requirements set forth below in subparagraphs a. through c. that (1) commenced and ceased prior to the Date of Entry of the Addendum; and (2) commenced prior to the Date of Entry of the Addendum and continued past the Date of Entry, provided that the events giving rise to such violations are identified by Premcor in its Initial Audit Report(s) submitted pursuant to Paragraph 188 and corrected by Premcor as required under Paragraph 192:

a. LDAR Requirements. For all equipment in light liquid service and gas and/or vapor service, the LDAR requirements of Plaintiff-Interveners under state implementation plans adopted pursuant to the Clean Air Act or promulgated by EPA pursuant to Sections 111 and 112 of the Clean Air Act, and codified at 40 C.F.R. Part 60, Subparts VV and GGG; 40 C.F.R. Part 61, Subparts J and V; and 40 C.F.R. Part 63, Subparts F, H, and CC;

b. Any applicable, federally-enforceable state or local regulations or permits that implement, adopt, or incorporate the specific regulatory requirements identified in Paragraph 354.a.

c. Any applicable state or local regulations or permits enforceable by the Plaintiff-Interveners that implement, adopt, or incorporate the specific regulatory requirements identified in Paragraph 354.a.

354A. **Resolution of Other Enforcement Matters**. In addition to the foregoing matters, this Addendum resolves, settles, and finally satisfies claims against Premcor asserted by or available to the

United States and/or Plaintiff-Interveners to the extent specifically listed in Appendix Q, R, and T hereto. Entry of this Addendum shall resolve all civil and administrative liability of Premcor for the matters set forth in Appendix Q, R, and T in the manner and to the extent set forth therein.

355. **Reservation of Rights Regarding Benzene NESHAP and LDAR Requirements.** Notwithstanding the resolution of liability in Paragraphs 353 and 354, nothing in this Addendum precludes the United States and/or the Plaintiff-Interveners from seeking from Premcor injunctive and/or other equitable relief or civil penalties for violations by Premcor of Benzene Waste NESHAP and/or LDAR requirements that (1) commenced prior to the Date of Entry of this Addendum and continued after the Date of Entry if Premcor fails to identify and address such violations as required by Paragraphs 127, 128, 188, 192 and/or section X.D of this Addendum; or (2) commenced after the Date of Entry of the Addendum.

356. **Audit Policy**. Nothing in this Addendum is intended to limit or disqualify Premcor on the grounds that information was not discovered and supplied voluntarily, from seeking to apply EPA's Audit Policy or any state or local audit policy to any violations or non-compliance that Premcor discovers during the course of any investigation, audit, or enhanced monitoring that Premcor is required to undertake pursuant to this Addendum.

357. **Claim/Issue Preclusion.** In any subsequent administrative or judicial proceeding initiated by the United States or the Plaintiff-Interveners for injunctive relief, penalties, or other appropriate relief relating to Premcor for violations of the PSD/NSR, NSPS, NESHAP, and/or LDAR requirements, not identified in Part XXIV (Effect of Settlement) of the Addendum and/or the Complaint:

a. Premcor shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, or claim-splitting as a result of this Addendum. Nor may Premcor assert or maintain any other defenses based upon any contention that the claims raised by the United States or the Plaintiff-Interveners in the subsequent proceeding

were or should have been brought in the instant case. Nothing in the preceding sentences is intended to affect the ability of Premcor to assert that the claims are deemed resolved by virtue of Part XXIII of the Addendum.

b. Except in enforcing Paragraph 357.a. the United States and the Plaintiff-Interveners may not assert or maintain that this Addendum constitutes a waiver or determination of, or otherwise obviates, any claim or defense whatsoever of Premcor, or that this Addendum constitutes acceptance by Premcor of any interpretation or guidance issued by EPA related to the matters addressed in this Addendum.

357A. Nothing in this Addendum is intended to limit any rights, claims or defenses otherwise legally available to Premcor in response to a claim or allegation by any person not a party to this Addendum. Without limitation to the foregoing, Premcor expressly reserves the right to respond to any allegation by any person that Premcor is or has violated any provision of applicable law at a refinery governed by this Addendum, including by asserting that such alleged violations have been resolved or otherwise addressed by this Addendum, that principals of preemption, waiver, res judicata, claim preclusion, or issue preclusion bar such claim, or that Premcor is entitled to a set off against any liability for such claim in the form of civil or administrative penalties, injunctive relief or any other remedy as a result of the civil penalty payments, stipulated penalty payments, implementation of supplemental environmental projects and/or emission control projects, standards or limitation undertaken by Premcor under this Addendum.

358. **Imminent and Substantial Endangerment.** Nothing in this Addendum shall be construed to limit the authority of the United States and the Plaintiff-Interveners to undertake any action against any person, including Premcor to abate or correct conditions which may present an imminent and substantial endangerment to the public health, welfare, or the environment, or limit the authority of a Plaintiff-Intervener to take action under similar circumstances under state statute or common law that may be necessary to protect the public health, safety, welfare and the environment.

XXV. TERMINATION

359. This Addendum shall be subject to termination upon motion by the United States or Premcor under the conditions identified in Paragraph 363 below. Prior to seeking termination, Premcor must have completed and satisfied all of the following requirements of this Addendum:

a. Installation of control technology systems as specified in this Addendum;

b. Compliance with all provision contained in this Addendum, which compliance may be established for specific parts of the Addendum in accordance with Paragraph 360 below.

c. Payment of all penalties and other monetary obligations due under the terms of the Addendum; no penalties or other monetary obligations due hereunder can be outstanding or owed to the United States or the Plaintiff-Interveners;

d. Completion of the Supplemental Environmental Projects as set forth in Part XIX; and

e. Application for and receipt of permits incorporating the emission limits and standards required by Part XIV [Permits].

360. **Certification of Completion**. Prior to moving for termination, Premcor may certify completion for one or more Refineries subject to this Addendum of one or more of the following parts of the Addendum, provided that all of the related requirements for that Refinery have been satisfied:

i. Part V - NOx Emission Reductions from Fluid Catalytic Cracking Unit (including operation of the unit for one year after completion in compliance with the emission limit set pursuant to the Addendum);

ii. Parts VI, VII and VIII - SO_2 , CO, particulate and opacity Emission Reductions from Fluid Catalytic Cracking Unit (including operation of the unit for one year after completion in compliance with the emission limits set pursuant to the Addendum);

iii Parts IV and IX – Heaters and Boilers (including operation of the relevant units for one year after completion in compliance with the emission limit set pursuant to the Addendum);

iv. Parts X and XI – BWON and LDAR;

v. Part XII – SRPs and Flares

vi. Part XIX – Beneficial and Supplemental Environmental Projects

361. If Premcor elects to certify completion of any of the parts of the Addendum identified in Paragraph 360 for any Refinery subject to this Addendum, then Premcor may submit a written report to EPA and the appropriate Plaintiff-Intervener describing the activities undertaken and certifying that the applicable Parts have been completed in full satisfaction of the requirements of this Addendum, and that Premcor is in substantial and material compliance with all of the other requirements of the Addendum. The report shall contain the following statement, signed by a responsible corporate official of Premcor:

> "To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

362. Upon receipt of Premcor's certification, EPA, after reasonable opportunity for review and comment by the Plaintiff-Interveners, shall notify Premcor whether the requirements set forth in the applicable Part(s) have been completed in accordance with this Addendum. The parties recognize that ongoing obligations under such Part(s) remain and necessarily continue (*e.g.*, reporting, record keeping, training, auditing requirements), and that Premcor's certification, as applicable, is that it is in current compliance with all such obligations.

a. If EPA concludes that the requirements of such Part(s) have not been fully complied with in accordance with this Addendum, EPA shall notify Premcor as to the activities that must be undertaken to complete the applicable Parts of the Addendum. Premcor shall perform all

activities described in the notice, subject to its right to invoke the dispute resolution procedures set forth in Part XXIII (Dispute Resolution).

b. If EPA concludes that the requirements of the applicable paragraphs have been completed in accordance with this Addendum, EPA will so certify in writing to Premcor. This certification shall constitute the certification of completion of the applicable Parts for purposes of this Addendum. Nothing in this Paragraph 362 shall preclude the United States or the Plaintiff-Interveners from seeking stipulated penalties for a violation of any of the requirements of the Addendum regardless of whether a Certification of Completion has been issued under this paragraph. In addition, nothing in this Paragraph 362 shall permit Premcor to fail to implement any ongoing obligations under the Addendum regardless of whether a Certification of Completion has been issued with respect to this paragraph of the Addendum.

363. At such time as Premcor believes that it has satisfied the requirements for termination set forth in Paragraph 359, it shall certify such compliance and completion to the United States and the Plaintiff-Interveners in writing. Unless either the United States or any Plaintiff-Intervener objects in writing with specific reasons within 120 days of receipt of Premcor's certification under this paragraph, Premcor shall then move and the Court may order that this Addendum be terminated. If either the United States or any Plaintiff-Intervener objects to the certification by Premcor then the matter shall be submitted to the Court for resolution under Part XXIII (Dispute Resolution) of this Addendum.

364. The Effect of Settlement provisions set forth in Part XXIV shall survive termination of this Addendum.

XXVI. GENERAL PROVISIONS

365. Effect of Refinery or Source Shutdown. Notwithstanding any provision of this Addendum, the permanent shutdown of any source or refinery subject to any requirement of this Addendum shall satisfy any provision in this Addendum applicable to such source or refinery, and

Premcor shall not be obligated hereunder to continue operation of such source or refinery in order to institute or satisfy any requirement otherwise applicable to such source or refinery pursuant to the terms of the Addendum. The foregoing does not relieve Premcor's ongoing obligation to implement Part XIX [SEPs].

366. Other Laws. Except as specifically provided by this Addendum, nothing in this Addendum shall relieve Premcor of its obligation to comply with all applicable federal, state and local laws and regulations, including, but not limited to, more stringent standards. In addition, nothing in this Addendum shall be construed to prohibit or prevent the United States or Plaintiff-Interveners from developing, implementing, and enforcing more stringent standards subsequent to the Date of Lodging of this Addendum through rulemaking, the permit process, or as otherwise authorized or required under federal, state, regional, or local laws and regulations. In addition, except as otherwise expressly provided in this Addendum, nothing in this Addendum is intended to eliminate, limit or otherwise restrict any compliance options, exceptions, exclusions, waivers, variances, or other right otherwise provided or available to Premcor under any applicable statute, regulation, ordinance, regulatory or statutory determination, or permitting process. Subject to Part XXIV [Effect of Settlement] and except as provided under Part XX [Stipulated Penalties], nothing contained in this Addendum shall be construed to prevent, alter or limit the United States' and Plaintiff-Interveners' rights to seek or obtain other remedies or sanctions against Premcor available under other federal, state or local statutes or regulations, in the event that Premcor violates this Addendum or of the statutes and regulations applicable to violations of this Addendum. This shall include the United States' and Plaintiff-Interveners' right to invoke the authority of the Court to order Premcor's compliance with this Addendum in a subsequent contempt action.

367. Changes to Law. In the event that during the life of this Addendum there is change in the statutes or regulations that provide the underlying basis for the Addendum such that Premcor would not otherwise be required to perform any of the obligations herein or would have the option to

undertake or demonstrate compliance in an alternative or different manner, Premcor may petition the Court for relief from any such requirements, in accordance with Rule 60 of the Federal Rules of Civil Procedures ("F.R.Civ.P."). However, if Premcor applies to the Court for relief under this Paragraph, the United States and the Applicable Plaintiff-Interveners reserve the right to seek to void all or part of the Resolution of Liability reflected in Part XXIV [Effect of Settlement]. Nothing in this Paragraph is intended to enlarge the Parties' rights under Rule 60, nor is this Paragraph intended to confer on any Party any independent basis, outside of Rule 60, for seeking such relief. This Paragraph 367 does not apply to Premcor's obligation to complete the supplemental/beneficial environmental projects referred to in Part XIX of this Addendum.

368. Reserved.

369. Liability for Stipulated Penalties. Liability for stipulated penalties, if applicable, shall accrue for violation of such obligations, and payment of such stipulated penalties may be demanded by the United States or Plaintiff-Intervener, as provided in this Addendum, provided that stipulated penalties that may have accrued between the Date of Lodging of this Addendum and the Date of Entry of the Addendum may not be collected by the United States or any Plaintiff-Intervener unless and until the Addendum is entered by the Court.

370. Contractors. Except where expressly prohibited, Premcor may rely upon a contractor to fulfill its obligations under this Addendum. Where Premcor uses one or more contractors to comply with material obligations under this Addendum, Premcor shall ensure that the contractor is aware of and in compliance with the requirements of this Addendum.

371. Third Parties. Except as otherwise provided herein, this Addendum does not limit, enlarge or affect the rights of any party to this Addendum as against any third parties.

372. Costs. The United States, Plaintiff-Interveners and Premcor shall each bear their own costs and attorneys' fees.

373. Public Documents. All information and documents submitted by Premcor to the United States and Plaintiff-Interveners pursuant to this Addendum shall be subject to public inspection, unless (a) subject to legal privileges or protection or (b) identified and supported as business confidential by Premcor in accordance with 40 C.F.R. Part 2, or any equivalent state statutes and regulations.

374. Public Comments. The parties agree and acknowledge that final approval by the United States and the appropriate Plaintiff-Intervener and entry of this Addendum is subject to the requirements of 28 C.F.R. § 50.7, which provides for notice of the lodging of this Addendum in the Federal Register, an opportunity for public comment, and consideration of any comments.

375. Reserved.

376. Notice. Unless otherwise provided herein, notifications hereunder to or communications with the United States, the appropriate Plaintiff-Intervener, Premcor shall be deemed submitted on the date they are postmarked and sent either by overnight receipt mail service or by certified or registered mail, return receipt requested. When Premcor is required to submit notices or communicate in writing under this Addendum to EPA relating to one of the Premcor Refineries, Premcor shall also submit a copy of that notice or other writing to the applicable Plaintiff-Intervener for the refinery located in that state. Except as otherwise provided herein, when written notification or communication is required by this Addendum, it shall be addressed as follows:

As to the United States:
Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611, Ben Franklin Station
Washington, DC 20044-7611

United States Attorney
Western District of Texas
c/o U.S. Marshal Service
U.S. Courthouse
655 E. Durango
San Antonio, TX 78206

As to the U.S. Environmental Protection Agency:

Director
Air Enforcement Division (2242A)
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

with a hard copy to:
Director
Air Enforcement Division
Office of Enforcement and Compliance Assurance
c/o Matrix New World Engineering Inc.
120 Eagle Rock Ave., Suite 207
East Hanover, NJ 07936-3159

and an electronic copy to:
csullivan@matrixnewworld.com

With copies to the EPA Regional office where the relevant refinery is located:

EPA Region 4:

Director
Division of Enforcement and Compliance Assistance
U.S. Environmental Protection Agency,
Region 4
Sam Nunn Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA 30303-3104

EPA Region 5:

Director
Division of Enforcement and Compliance Assistance
U.S. Environmental Protection Agency,
Region 5
77 W. Jackson Blvd.
Chicago, IL 60604

Compliance Tracker
U.S. EPA Region 5
77 W. Jackson Blvd
Mail Code: AE-17J
Chicago, IL 60604

EPA Region 6:

Chief
Air, Toxics, and Inspection Coordination Branch (6EN-A)

Compliance Assurance and Enforcement Division
U.S. Environmental Protection Agency, Region 6
1445 Ross Avenue
Dallas, Texas 75202

As to Plaintiff-Intervener, the State of Ohio:

Teri J. Finfrock, or her successor
Air Program Supervisor
Office of the Attorney General of Ohio
Environmental Enforcement Section
30 East Broad Street, 25th Floor
Columbus, Ohio 43215-3400

Don Waltermeyer
Environmental Supervisor
Ohio Environmental Protection Agency
Division of Air Pollution Control
Northwest District Office
347 North Dunbridge Road
Bowling Green, Ohio 43402

As to Plaintiff-Intervener, Memphis Shelby County Health Department

Bob Rogers, P.E.
Manager, Pollution Control
Memphis & Shelby County Health Department
Pollution Control Section
814 Jefferson Avenue
Memphis, Tennessee 38105

As to Premcor:

Mr. Norman Renfro, Vice President
Health Safety & Environment
The Premcor Refining Group Inc. and Lima Refining Company
One Valero Place
San Antonio, TX 78249

Richard Walsh, Esquire
The Premcor Refining Group Inc. and Lima Refining Company
One Valero Place
San Antonio, TX 78249

Bart E. Cassidy, Esquire
Manko, Gold, Katcher & Fox, LLP
401 City Avenue, Suite 500
Bala Cynwyd, PA 19004

377. All EPA and Plaintiff-Intervener approvals or comments required under this Decree shall be in writing.

378. Any party may change either the notice recipient or the address for providing notices to it by serving all other parties with a written notice setting forth such new notice recipient or address.

379. The information required to be maintained or submitted pursuant to this Addendum is not subject to the Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3501 et seq.

380. This Addendum shall be binding upon all Parties to this action, and their successors and assigns. The undersigned representative of each Party to this Addendum certifies that he or she is duly authorized by the Party whom he or she represents to enter into the terms and bind that Party to them.

381. Modification. This Addendum may be modified only by the written approval of the United States, the appropriate Plaintiff-Intervener and Premcor, or by Order of the Court. Additionally, it is anticipated that EPA, the appropriate Plaintiff-Intervener and Premcor may reduce the frequency or nature of reporting over time. Non-material modifications need not be filed with the Court to be effective, but material modifications shall be effective only upon filing with the Court. The United States will file non-material modifications with the Court on a periodic basis. For purposes of this Paragraph, non-material modifications include, but are not limited to, modifications to the frequency of reporting obligations and modifications to schedules that do not extend the date for compliance with emission limitations following the installation of control equipment or the completion of a catalyst additive program, provided such changes are agreed upon in writing between EPA and Premcor.

382. Continuing Jurisdiction. The Court retains jurisdiction of this case after entry of this Addendum to enforce compliance with the terms and conditions of this Addendum and to take any action necessary or appropriate for its interpretation, construction, execution, or modification. During the term of this Addendum, any party may apply to the Court for any relief necessary to construe or effectuate this Addendum.

383. This Addendum constitutes the entire agreement and settlement between the Parties. Prior drafts of the Addendum shall not be used in any action involving the interpretation or enforcement of the Addendum.

So entered in accordance with the foregoing this 20th day of Nov., 2007

Royal Furgeson
United States District Court Judge
for the Western District of Texas

FOR PLAINTIFF, UNITED STATES OF AMERICA:

Date 8 Aug. 2007

RONALD J. TENPAS
Acting Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-00001

Date 8/14/07

SUSAN AKERS
Senior Attorney
SCOTT BAUER
KATHERINE KANE
Trial Attorneys
Environment and Natural Resources Division
U.S. Department of Justice
1425 New York Avenue, N.W.
Washington, DC 20005

United States of America, et al. v. Premcor Refining Group, Inc. et al., No. SA-05-CA-0569-RF (W.D. Tex.)

FOR U.S. ENVIRONMENTAL PROTECTION AGENCY:

Date 25 May 2007

GRANTA Y. NAKAYAMA
Assistant Administrator
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

FOR PLAINTIFF, THE STATE OF OHIO:

MARC DANN
Attorney General of Ohio

By: _____ Date: 7/16/07
TERI J. FINEROCK
Assistant Attorney General
Environmental Enforcement Section
30 East Broad Street, 25th Floor
Columbus, Ohio 43215-3400

ATTORNEY FOR
PLAINTIFF
STATE OF OHIO

FOR PLAINTIFF-INTERVENER, THE TENNESSEE COUNTY OF SHELBY AND CITY OF MEMPHIS:

Date: 5/16/07

YVONNE S. MADLOCK
Director
Memphis and Shelby County Health Department
814 Jefferson Avenue
Memphis, Tennessee 38105

FOR DEFENDANT, THE PREMCOR REFINING GROUP INC. and LIMA REFINING COMPANY:

Norman L Renfro Date 6/12/07

NORMAN L. RENFRO
Vice President
The Premcor Refining Group Inc. and Lima Refining Company
P. O. Box 696000
San Antonio, TX 78269-6000
Telephone: (210) 345-2790
Fax: (210) 345-4976

Message

From: Marie Sanderson [msanderson@GPS-50.com]
Sent: 3/13/2017 6:53:50 PM
To: Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]
Subject: RE: Phone call- connecting

Thanks so much! I will pass along your email now. And I definitely appreciate your kind, prompt response and I can only imagine how busy you are!

From: Schwab, Justin [mailto:schwab.justin@epa.gov]
Sent: Monday, March 13, 2017 1:53 PM
To: Marie Sanderson <msanderson@GPS-50.com>
Subject: Re: Phone call- connecting

Yes, that's fine. In the interim I will reach out to the appropriate career personnel, whom I understand in this instance to be the Water Law Office.

Best,

Justin

Sent from my iPhone

On Mar 13, 2017, at 2:41 PM, Marie Sanderson <msanderson@GPS-50.com> wrote:

> Justin- hope this email finds you well. Samantha Dravis passed along your name to me.
>
> Pacific Seafood, based in Oregon, asked who they should contact about a case- to brief the appropriate person with EPA regarding an amicus on a case now pending in the 9th Circuit. They indicated that they find themselves defending EPA's regulations regarding Concentrated Aquatic Animal Product Facilities (CAAPFs) and would appreciate the agency's support.
>
> I don't need to be involved in the call but was hoping you'd agree to let me pass along your name/email?
>
> Best,
> Marie
>
> **Marie Sanderson**
> **President**
> **GuidePostStrategies**
> MSanderson@GPS-50.com
> **Ex. 6**

Message

From: Schwab, Justin [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=EED0F609C0944CC2BBDB05DF3A10AADB-SCHWAB, JUS]
Sent: 5/4/2017 12:37:08 AM
To: Tenpas, Ronald J. [ronald.tenpas@morganlewis.com]
Subject: Re: Time for a quick discussion?

Ron, thanks for the cell and we appreciate all the time invested today by you.

Sent from my iPhone

> On May 3, 2017, at 8:29 PM, Tenpas, Ronald J. <ronald.tenpas@morganlewis.com> wrote:
>
> Understood. Thanks for the update. I didn't mean to suggest I was trying to pressure you -- I just wanted to be sure you all had the cell given it is a collective effort for your team and I wasn't sure who might want to reach me. Please don't hesitate to call tonight if that is helpful to you.
>
> Ron
>
> Ronald J. Tenpas
> Morgan, Lewis & Bockius LLP
> 1111 Pennsylvania Avenue, NW | Washington, DC 20004-2541
> Ex. 6 Main: +1.202.739.3000 Ex. 6 Fax: +1.202.739.3001
> ronald.tenpas@morganlewis.com | www.morganlewis.com
> Assistant: Linda J. Ramsburg Ex. 6 linda.ramsburg@morganlewis.com
>
> -----Original Message-----
> From: Wood, Jeffrey (ENRD) [mailto:Jeffrey.Wood@usdoj.gov]
> Sent: Wednesday, May 03, 2017 8:24 PM
> To: Tenpas, Ronald J.; Haas, Alex (CIV); Schwab.justin@Epa.gov
> Subject: RE: Time for a quick discussion?
>
> We are working on it. Will be back in touch as soon as able...
>
> -----Original Message-----
> From: Tenpas, Ronald J. [mailto:ronald.tenpas@morganlewis.com]
> Sent: Wednesday, May 03, 2017 8:22 PM
> To: Haas, Alex (CIV) <alhaas@CIV.USDOJ.GOV>; Wood, Jeffrey (ENRD) <JWood@ENRD.USDOJ.GOV>; Schwab.justin@Epa.gov
> Subject: RE: Time for a quick discussion?
>
> Justin/Jeff/Alex,
>
> I am heading out. If you end up wanting to talk tonight, you can reach me at Ex. 6
>
> Again, thanks for both of the quick calls today and for juggling your schedules.
>
> Ron
>
> Ronald J. Tenpas
> Morgan, Lewis & Bockius LLP
> 1111 Pennsylvania Avenue, NW | Washington, DC 20004-2541
> Ex. 6 Main: +1.202.739.3000 Ex. 6 Fax: +1.202.739.3001
> ronald.tenpas@morganlewis.com | www.morganlewis.com
> Assistant: Linda J. Ramsburg Ex. 6 linda.ramsburg@morganlewis.com
>
>
> -----Original Message-----
> From: Haas, Alex (CIV) [mailto:Alex.Haas@usdoj.gov]
> Sent: Wednesday, May 03, 2017 6:29 PM
> To: Wood, Jeffrey (ENRD); Tenpas, Ronald J.; Schwab.justin@Epa.gov
> Subject: Re: Time for a quick discussion?
>
> Sorry having trouble dealing with the calendar app.
>
> Let's use this dial in: Ex. 6
> Code: Ex. 6
>
>
>
> Sent from my Verizon, Samsung Galaxy smartphone
>

>
> -------- Original message --------
> From: "Wood, Jeffrey (ENRD)" <JWood@ENRD.USDOJ.GOV>
> Date: 5/3/17 6:23 PM (GMT-05:00)
> To: "Haas, Alex (CIV)" <alhaas@CIV.USDOJ.GOV>, "Tenpas, Ronald J." <ronald.tenpas@morganlewis.com>,
Schwab.justin@Epa.gov
> Subject: RE: Time for a quick discussion?
>
> Me too
>
> From: Haas, Alex (CIV)
> Sent: Wednesday, May 03, 2017 6:23 PM
> To: Tenpas, Ronald J. <ronald.tenpas@morganlewis.com>; Wood, Jeffrey (ENRD) <JWood@ENRD.USDOJ.GOV>;
Schwab.justin@Epa.gov
> Subject: Re: Time for a quick discussion?
>
> I can do a call. It might be most productive to have all of us on it.
>
>
>
> Sent from my Verizon, Samsung Galaxy smartphone
>
>
> -------- Original message --------
> From: "Tenpas, Ronald J." <ronald.tenpas@morganlewis.com<mailto:ronald.tenpas@morganlewis.com>>
> Date: 5/3/17 6:06 PM (GMT-05:00)
> To: "Wood, Jeffrey (ENRD)" <JWood@ENRD.USDOJ.GOV<mailto:JWood@ENRD.USDOJ.GOV>>,
Schwab.justin@Epa.gov<mailto:Schwab.justin@Epa.gov>
> Cc: "Haas, Alex (CIV)" <alhaas@CIV.USDOJ.GOV<mailto:alhaas@CIV.USDOJ.GOV>>
> Subject: Time for a quick discussion?
>
> Jeff/Justin/Alex,
>
> Would one (or all of you have time for a quick call)? I appreciated the candor on the call and I have
had a chance to speak further with my client. I think I have some pretty concrete feedback at this
point.
>
> Ron
>
> Ronald J. Tenpas
> Morgan, Lewis & Bockius LLP
> 1111 Pennsylvania Avenue, NW | Washington, DC 20004-2541
> Ex. 6 Main: +1.202.739.3000 Ex. 6 Fax: +1.202.739.3001
> ronald.tenpas@morganlewis.com<mailto:ronald.tenpas@morganlewis.com> |
www.morganlewis.com<http://www.morganlewis.com/>
> Assistant: Linda J. Ramsburg Ex. 6 linda.ramsburg@morganlewis.com
<mailto:linda.ramsburg@morganlewis.com>
>
>
>
>
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Message

From: Schwab, Justin [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=EED0F609C0944CC2BBDB05DF3A10AADB-SCHWAB, JUS]
Sent: 4/12/2017 3:08:10 PM
To: Whitfield, Peter C. [peter.whitfield@hoganlovells.com]
Subject: Re: Meeting with EPA

Will try to make meeting

Sent from my iPhone

On Apr 12, 2017, at 9:43 AM, Whitfield, Peter C. <peter.whitfield@hoganlovells.com> wrote:

> Let me know if you have a minute to chat this morning. Also, any chance you will be at the meeting today?

Peter Whitfield
Senior Associate

Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004

Tel: +1 202 637 5600
Direct: Ex. 6
Fax: +1 202 637 5910
Email: peter.whitfield@hoganlovells.com
www.hoganlovells.com

From: Schwab, Justin [mailto:schwab.justin@epa.gov]
Sent: Monday, April 10, 2017 4:23 PM
To: Whitfield, Peter C.
Subject: Re: Meeting with EPA

Yes but not at the moment. When is your meeting?

Sent from my iPhone

On Apr 10, 2017, at 4:20 PM, Whitfield, Peter C. <peter.whitfield@hoganlovells.com> wrote:

> Hey Justin,
> Hope all is well. We have a meeting on Wednesday with Mandy and others at EPA. I wanted to reach out and touch base on a few details – any chance you have time for a quick call?

Peter Whitfield
Senior Associate

Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004

Tel: +1 202 637 5600
Direct: Ex. 6
Fax: +1 202 637 5910
Email: peter.whitfield@hoganlovells.com
www.hoganlovells.com

Message

From: Schwab, Justin [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=EED0F609C0944CC2BBDB05DF3A10AADB-SCHWAB, JUS]
Sent: 12/21/2017 1:06:44 PM
To: matthew.kuryla@bakerbotts.com [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=0f258c275a5c45119dd6a95a93f7b41e-matthew.kuryla@bakerbotts.com]
Subject: Re: Visit

Unfortunately, I will not be in the office this afternoon. Sorry to have missed you.

Sent from my iPhone

On Dec 21, 2017, at 7:23 AM, "matthew.kuryla@bakerbotts.com" <matthew.kuryla@bakerbotts.com> wrote:

> Justin, do you have a couple minutes today at 1:30 or 2? I'll be in the offices and would love to just swing by and meet you.
>
> Sent from my iPhone

Message

From: Schwab, Justin [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=EED0F609C0944CC2BBDB05DF3A10AADB-SCHWAB, JUS]
Sent: 1/9/2018 10:41:04 PM
To: matthew.kuryla@bakerbotts.com [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=0f258c275a5c45119dd6a95a93f7b41e-matthew.kuryla@bakerbotts.com]
Subject: Title V

Thanks for your message last week. Sorry for delay in responding (our new GC was just sworn in and it's firehose-drinking time all over again.)

I will be in touch with our people working that issue and if there's a conversation needed to be had we'll reach out soon.

Message

From: Schwab, Justin [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=EED0F609C0944CC2BBDB05DF3A10AADB-SCHWAB, JUS]
Sent: 3/29/2017 12:50:28 PM
To: Whitfield, Peter C. [peter.whitfield@hoganlovells.com]
Subject: RE: Trump EO

https://www.whitehouse.gov/the-press-office/2017/03/28/presidential-executive-order-promoting-energy-independence-and-economi-1

From: Whitfield, Peter C. [mailto:peter.whitfield@hoganlovells.com]
Sent: Tuesday, March 28, 2017 4:11 PM
To: Schwab, Justin <schwab.justin@epa.gov>
Subject: RE: Trump EO

Thanks – Inside EPA has sent out two stories on it today, but no EO attached. I was trying to figure out how they have a copy that nobody else has.

Peter Whitfield
Senior Associate

Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004

Tel: +1 202 637 5600
Direct: Ex. 6
Fax: +1 202 637 5910
Email: peter.whitfield@hoganlovells.com
www.hoganlovells.com

From: Schwab, Justin [mailto:schwab.justin@epa.gov]
Sent: Tuesday, March 28, 2017 4:10 PM
To: Whitfield, Peter C.
Subject: RE: Trump EO

I don't think I have a copy of the EO as signed today. If the White House doesn't have it, surely Inside EPA or E&E will have it soon….

From: Whitfield, Peter C. [mailto:peter.whitfield@hoganlovells.com]
Sent: Tuesday, March 28, 2017 4:08 PM
To: Schwab, Justin <schwab.justin@epa.gov>
Subject: Trump EO

Justin,

Any chance you have a copy of the executive order released today regarding climate change policy/CPP? I'm seeing news on it, but no actual EO.
Thanks,
Peter

Peter Whitfield
Senior Associate

Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004

Tel: +1 202 637 5600
Direct: Ex. 6
Fax: +1 202 637 5910
Email: peter.whitfield@hoganlovells.com
www.hoganlovells.com

Message

From: Schwab, Justin [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=EED0F609C0944CC2BBDB05DF3A10AADB-SCHWAB, JUS]
Sent: 11/17/2017 12:19:19 AM
To: matthew.kuryla@bakerbotts.com
CC: jim.rizk@tceq.texas.gov; jhudson@tceq.texas.gov
Subject: RE: call

Matt,

Thank you very much. This was a constructive conversation about SSM issues and provided much food for thought. No worries on the client names. Will follow up and look forward to talking again.

Best,

Justin

From: matthew.kuryla@bakerbotts.com [mailto:matthew.kuryla@bakerbotts.com]
Sent: Thursday, November 16, 2017 6:14 PM
To: Schwab, Justin <Schwab.Justin@epa.gov>
Cc: jim.rizk@tceq.texas.gov; jhudson@tceq.texas.gov
Subject: call

Justin, thanks so much. On the call were Matt Kuryla and Mark Hamlin of Baker Botts, and Jon Niermann, Jim Rizk and Janis Hudson of the Texas Commission on Environmental Quality.

Without consent, I'm afraid I can't outline the client names. The group is not a legal entity, but consists of several industrial companies with substantial operations in Texas.

Please let me or Janis (copied) know if there are any other questions that occur to you along the way, or any other components of the record we can provide. We'd be eager to do it.

Again, thanks.

Matt Kuryla
Partner

Baker Botts L.L.P.
matthew.kuryla@bakerbotts.com

Ex. 6

910 Louisiana Street
Houston, Texas 77002
USA

BAKER BOTTS

Message

From: Schwab, Justin [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=EED0F609C0944CC2BBDB05DF3A10AADB-SCHWAB, JUS]
Sent: 11/30/2017 1:47:00 PM
To: matthew.kuryla@bakerbotts.com
CC: mark.hamlin@bakerbotts.com
Subject: RE: Delaware
Attachments: DE RACT SIP 112217.pdf

Please find attached.

From: matthew.kuryla@bakerbotts.com [mailto:matthew.kuryla@bakerbotts.com]
Sent: Monday, November 27, 2017 9:18 AM
To: Schwab, Justin <Schwab.Justin@epa.gov>
Cc: mark.hamlin@bakerbotts.com
Subject: Delaware

Justin, was something signed? If so, I'd love a copy. Thanks!

Matt Kuryla
Partner

Baker Botts L.L.P.
matthew.kuryla@bakerbotts.com

Ex. 6

910 Louisiana Street
Houston, Texas 77002
USA

BAKER BOTTS

6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2015-0656; FRL-]

Approval and Promulgation of Air Quality Implementation Plans; Delaware; Reasonably Available Control Technology (RACT) State Implementation Plan (SIP) Under the 2008 Ozone National Ambient Air Quality Standard (NAAQS)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a state implementation plan (SIP) revision submitted by the State of Delaware. This revision pertains to reasonably available control technology (RACT) requirements under the 2008 8-hour ozone national ambient air quality standard (NAAQS). Delaware's submittal for RACT for the 2008 ozone NAAQS includes (1) certification that, for certain categories of sources, RACT controls approved by EPA into Delaware's SIP for previous ozone NAAQS are based on currently available technically and economically feasible controls and continue to represent RACT for 2008 8-hour ozone NAAQS implementation purposes; (2) the adoption of new or more stringent regulations or controls that represent RACT control levels for certain other categories of sources; and (3) a negative declaration that certain categories of sources do not exist in Delaware. EPA is approving these revisions to the Delaware SIP addressing 2008 8-hour ozone RACT in accordance with the requirements of the Clean Air Act (CAA).

DATES: This final rule is effective on **[insert date 30 days after date of publication in the Federal Register]**.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA-R03-OAR-2015-0656. All documents in the docket are listed on the http://www.regulations.gov website. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available through http://www.regulations.gov, or please contact the person identified in the "For Further Information Contact" section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Leslie Jones Doherty, (215) 814-3409, or by e-mail at jones.leslie@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On September 12, 2017 (82 FR 42767), EPA published a notice of proposed rulemaking (NPR) for the State of Delaware. In the NPR, EPA proposed approval of Delaware's SIP revision pertaining to the RACT requirements under the 2008 8-hour ozone NAAQS. The formal SIP revision was submitted by Delaware on May 4, 2015.

II. Summary of SIP Revision and EPA Analysis

A. RACT

On May 4, 2015, Delaware submitted a SIP revision to address all the requirements of RACT set forth by the CAA under the 2008 8-hour ozone NAAQS (the 2015 RACT Submission). Specifically, Delaware's 2015 RACT Submission includes: (1) A certification that for certain

categories of sources previously adopted nitrogen oxide (NOx) and volatile organic compound (VOC) RACT controls in Delaware's SIP that were approved by EPA under the 1979 1-hour and 1997 8-hour ozone NAAQS are based on the currently available technically and economically feasible controls, and continue to represent RACT for implementation of the 2008 8-hour ozone NAAQS; (2) the adoption of new or more stringent regulations or controls that represent RACT control levels for certain categories of sources; and (3) a negative declaration that certain control technique guidelines (CTGs) or non-CTG major sources of VOC and NOx sources do not exist in Delaware.

EPA has reviewed Delaware's 2015 RACT Submission and finds Delaware's certification of the RACT regulations for major sources of VOC and NOx previously approved by EPA for the 1-hour and 1997 8-hour ozone NAAQS continue to represent RACT-level controls for the source categories for the 2008 8-hour ozone NAAQS. EPA finds that Delaware's major stationary source VOC and NOx regulations represent the lowest emission limits based on currently available and economically feasible control technology for these source categories. EPA also finds that Delaware's SIP implements RACT with respect to all sources of VOCs covered by a CTG issued prior to July 20, 2014 and all major stationary sources of VOC and NOx via Delaware's regulations and case-by-case RACT. EPA accepts Delaware's negative declarations that the following VOC CTG source categories do not exist in Delaware: manufacture of pneumatic rubber tires; wood furniture manufacturing operations; shipbuilding and ship repair operations (surface coating); and fiberglass boat manufacturing materials. EPA's review indicates that Delaware's 2015 RACT Submission meets the RACT requirements for the 2008 8-hour ozone NAAQS for applicable CTG source categories and major stationary sources of VOC and NOx to address sections 182(b), 182(f) and 184(b)(2) of the CAA.

With respect to the previous case by case RACT determinations submitted by Delaware and approved by EPA for the Delaware SIP, the CAA section 110(l) states "The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (RFP) or any applicable requirement of the CAA." EPA finds that the removal of the emission limits for 1) the Polyhydrate Alcohol Catalyst Regenerative process SPI Polyols, Incorporated, 2) the sulfuric acid process and inter-stage absorption system at General Chemical Corporation and 3) the metallic nitrite process at General Chemical Corporation from the Delaware SIP will not interfere with attainment of any NAAQS or with RFP or any applicable requirement of the CAA because these sources have permanently shut down and thus emissions have been completely eliminated. EPA finds the NOx RACT determination for CitiSteel USA, Incorporated, Electric Arc Furnace (EAF) continues to represent the lowest emission limitation that is reasonably available considering technological and economic feasibility for this source. With respect to the Fluid-Coking Unit (FCU) and Fluid Catalytic Cracking Unit (FCCU) at the Delaware City Refinery Company, EPA finds that the emission limits, compliance requirements and recordkeeping and reporting requirements established by Delaware represent RACT level of control for these units.

Other specific requirements of Delaware's SIP submission addressing 2008 8-hour ozone RACT and the rationale for EPA's proposed action are explained in the NPR and technical support document (TSD) and will not be restated here.

B. RACT and the EPA Startup, Shutdown, and Malfunction (SSM) SIP Call

On May 22, 2015, the EPA Administrator signed a final action, EPA's SSM SIP Call (formally, the "State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update

of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction"). 80 FR 33839. As discussed in the NPR, Delaware relies upon both Regulation 1124 and Regulation 1142 to meet its RACT obligations for the 2008 ozone NAAQS. Therefore, our review of the Delaware 2015 RACT Submission necessarily included our review of Regulation 1124 and 1142, which were subject to EPA's SSM SIP Call because at the time EPA found that the provisions gave the State discretion to create exemptions allowing excess emissions during startup and shutdown. In 2016, Delaware revised Regulations 1124 and 1142 in the State law to remove the provisions identified by EPA in EPA's SSM SIP Call, and Delaware subsequently submitted, on November 21, 2016, a SIP revision to address EPA's SSM SIP Call for Regulation 1124 (subsection 1.4) and Regulation 1142 (subsection 2.3.1.6). EPA has not yet taken final action on that submittal; any action on Delaware's November 21, 2016 SSM SIP revision would be done through a separate rulemaking action.

As stated in the NPR, the EPA is actively reviewing the SSM SIP Call. Therefore, in the NPR, EPA proposed to approve the 2015 RACT Submission under two alternative bases.

EPA proposed to approve Delaware's 2015 RACT Submission on the basis that either (1) a change in EPA's SSM policy and withdrawal of the SSM SIP Call as to Delaware Regulations 1124 and 1142 would occur, or (2) a separate final rulemaking action approving the revised versions of Regulations 1124 and 1142 as revised in Delaware's response to the SSM SIP Call would occur. Under either basis, EPA proposed to find that Delaware's 2015 RACT Submission is fully consistent with CAA requirements for RACT. EPA was clear that either alternative basis for approval of the Delaware RACT assumed a separate Agency action. EPA did not propose to

effectuate either action in this rulemaking. Therefore, EPA did not consider those issues open for public comment as part of this rulemaking action. Any comments filed on this rulemaking that relate to the possibility of EPA changing the SSM Guidance generally, a possible withdrawal of EPA's SSM SIP Call as to Delaware Regulations 1124 and 1142, or a possible action by EPA on Delaware's SIP submittal in response to the SSM SIP call are outside the scope of this rulemaking, which is limited to EPA's action on Delaware's 2015 RACT Submission.

In the proposal, EPA made clear that under either alternative scenario regarding the SSM SIP Call, EPA would deem approval of Delaware's RACT SIP appropriate. Therefore, although EPA has not yet taken separate action related to the SSM SIP Call (to either withdraw the SIP Call as to Regulations 1124 and 1142 or to act on Delaware's SSM SIP submittal), we are approving today Delaware's 2015 RACT Submission because it meets RACT requirements under the CAA for the 2008 8-hour ozone NAAQS for the reasons discussed herein and as proposed in the NPR and in the TSD for this rulemaking.[1] We do not believe the SSM SIP Call prevents our final approval of the 2015 RACT Submission as it otherwise meets all CAA RACT requirements. First, as discussed in the NPR, because EPA is reviewing the SSM SIP Call, if EPA later withdraws portions that apply to Delaware's regulations, the regulations Delaware relies upon for RACT in Regulations 1124 and 1142 fully meet CAA requirements including requirements for emission limitations as well as RACT in sections 110, 172, 182 and 184 of the CAA. Alternatively, if EPA concludes its review and implements the SSM SIP Call, Delaware has already submitted a SIP revision in November 2016 that comprises revised versions of

[1] The TSD is available in the docket for this rulemaking and online at www.regulations.gov.

Regulations 1124 and 1142 that lack the director discretion provisions that EPA said in the SSM SIP Call were inconsistent with the CAA. EPA is approving the 2015 RACT Submission because, under the first scenario, if EPA withdraws its SSM SIP Call with respect to Delaware, Delaware's regulations in the SIP would be in compliance with CAA requirements, and, under the second scenario, if EPA continues to implement the SSM SIP Call, Delaware has either already submitted a revision complying with CAA requirements or, to the extent EPA determines that the already submitted revision is inadequate, Delaware will be required to submit a new or supplemental revision to address any deficiencies.

III. Public Comments and EPA's Responses

EPA received adverse public comments on the NPR. EPA has summarized the comments and provides responses to the adverse comments below. All other comments received were not specific to this action and thus are not addressed here.

Comment: One comment received from the SSM Coalition states that the CAA does not require nor authorize the EPA to declare SIPs to be inadequate due to provisions exempting or providing alternative requirements during periods of startup, shutdown or malfunction. The commenter notes that the EPA's SSM SIP Call rule states that the "SSM SIP Policy" is not binding on EPA and thus constitutes guidance. As guidance, this SSM Policy as of 2015 does not bind the states, the EPA nor other parties, but it does reflect the EPA's interpretation of CAA statutory requirements. The commenter refers to comments it previously filed on EPA's SSM SIP Call rulemaking. The commenter states EPA is free to approve the Delaware RACT provisions without first acting on provisions identified in the SSM SIP Call as the commenter asserts the state has the discretion to include SSM provisions in its SIP. The commenter also stated EPA

should revise its SSM SIP policy and withdraw the SSM SIP Call as to Delaware before approving the 2015 RACT Submission.

Response: As EPA stated in the NPR, any comments filed on this rulemaking that relate to the possibility of EPA changing the SSM Guidance generally or a possible withdrawal of EPA's SSM SIP Call as to Delaware Regulations 1124 and 1142 are outside the scope of this rulemaking, which is limited to EPA's action on Delaware's 2015 RACT Submission. Any EPA action to either withdraw the SSM SIP Call as to Delaware Regulations 1124 and 1142 or act on Delaware's SSM SIP submittal will be a separate Agency action.

Comment: Two commenters, the Environmental Integrity Project (EIP)[2] and an anonymous commenter, state that the Delaware provisions identified in EPA's SSM SIP Call contain impermissible exemptions to emission limitations under the CAA and, therefore, must be corrected before EPA can approve the Delaware 2015 RACT Submission. Commenters argue that approving the Delaware regulations as RACT with SSM exemptions in them violates the CAA requirement that SIPs include enforceable limitations which must apply at all times. Specifically, CAA sections 110(a)(2)(A) and 302(k) require SIPs to include enforceable emission limitations, which must apply on a continuous basis. Contrary to these requirements, the provisions in Delaware Regulations 1124 and 1142 give Delaware unbounded discretion to allow exemptions from SIP limits and therefore would not be emissions limitations that apply on a "continuous" basis. These provisions also interfere with the applicable requirements of the CAA because they allow Delaware to alter SIP limits through a process that is contrary to CAA section110(i). Section 110(i) provides that revisions to SIP provisions take place through

[2] EIP filed comments on behalf of EIP, Sierra Club, and the Center for Biological Diversity.

specified routes, including formal SIP revision processes. The provisions in Delaware Regulations 1124 and 1142, however, allow the state to alter the SIP limits through a permit process that does not fall into any of the allowed routes for SIP revision under section110(i) and does not require EPA approval. Similarly, the commenter states that the SSM exemptions in Regulations 1124 and 1142 are contrary to the CAA requirements for nonattainment areas in that section 172(c)(6) of the CAA requires nonattainment SIP provisions to include enforceable emission limitations to provide for attainment of the NAAQS, and these limitations required for nonattainment areas by CAA section 172 must also apply on a continuous basis and be enforceable to also meet CAA section 110(a)(2) requirements. The commenter asserted EPA made no claim that the Delaware provisions which include SSM provisions constitute RACT. Lastly, the commenter states that EPA's approval of the 2015 RACT Submission would be otherwise arbitrary and capricious as the SSM provisions in Delaware Regulations 1124 and 1142 would undermine enforcement of emissions limitations by EPA or citizens as the Delaware provisions identified in the SSM SIP Call would create alternative limits which are not enforceable or would interfere with CAA requirements for continuous emission limitations. The commenter asserts that emission limitations or exemptions from limits established outside the SIP revision process would interfere with attainment and maintenance of the NAAQS and thus with air quality in Delaware. The commenter asserts that if EPA approves the 2015 RACT Submission, EPA must acknowledge its departure from the SSM SIP Call and SSM policy and explain its position; otherwise, action approving the Delaware 2015 RACT Submission would be arbitrary and capricious. Finally, the commenter stated EPA cannot approve the Delaware regulations as meeting RACT while these regulations were found impermissible under the SSM SIP Call on either the hope SSM policy is changed or on the assumption Delaware's SSM

November 2016 SIP revision is adequate. The commenter supports this statement because portions of Delaware Regulations 1124 and 1142 were found "substantially inadequate" to meet CAA requirements which would include RACT. The commenter says EPA assuming Delaware's November 2016 SIP revision addressing SSM provisions is adequate would preclude public participation and predetermines the outcome of rulemaking on that SIP. The commenter said EPA must first resolve SSM policy before approving the 2015 RACT Submission or address SSM policy before acting and take action on the November 2016 SIP revision addressing the SSM SIP Call.

Response: EPA notes that commenters' statements are repeating arguments made in support of the SSM SIP Call. As stated previously, such comments relating to the SSM SIP Call and its statutory and policy basis in accordance with the CAA are outside the scope of this rulemaking. EPA's action here is limited to EPA's action on Delaware's 2015 RACT Submission. EPA explained above how we are approving the 2015 RACT Submission with the provisions which were identified in the SSM SIP Call as we find the Delaware regulations address RACT and CAA requirements for emission limitations. Thus, we disagree with the commenter that we cannot approve this 2015 RACT Submission without first "settling" SSM policy issues. If EPA, after concluding its reviewing of the SSM SIP Call, acts to withdraw the SSM SIP Call, then no further action is needed for the versions of Regulation 1124 and 1142 in the Delaware SIP as the Delaware regulations fully address RACT for 2008 ozone. If EPA after its review continues implementing the SSM SIP Call, EPA will act in a separate rulemaking on Delaware's SIP revision submittal which, if approved, would remove from the Delaware SIP the provisions related to SSM in Regulations 1124 and 1142.

Contrary to the commenter's assertion that EPA made "no claim" that Delaware's emission limits and control measures containing SSM constitute RACT, EPA explained in detail in both the NPR and in the TSD prepared in support of the rulemaking how Regulations 1124 and 1142 address RACT requirements for the 2008 ozone NAAQS.[3] EPA's explanation and analysis outlined how the Delaware regulations and measures reflect the currently available technically and economically feasible controls and the lowest achievable emission limitations for major stationary sources required to have NOx and VOC RACT. EPA also explained in detail in the NPR and TSD how provisions in Regulation 1124 met requirements for CTGs to be in the Delaware SIP as required by CAA sections 182 and 184.

Finally, as specifically stated in the NPR, EPA noted that we cannot prejudge a final approval on Delaware's November 2016 SSM SIP Call submission. EPA explained in the NPR we would take public comment on any proposal to act on that November 2016 SIP and that if EPA would change direction based on comments received on any such proposed rulemaking to approve that SIP submission, we would not be able to approve the SSM SIP Call submission.

III. Final Action

EPA is approving the State of Delaware's May 4, 2015 SIP revision submittal (the 2015 RACT Submission) which addresses the 2008 8-hour ozone NAAQS RACT requirements as a revision to the Delaware SIP.

IV. Incorporation by Reference

In this rule, EPA is finalizing regulatory text that includes incorporation by reference. In

[3] The TSD is available in the docket for this rulemaking and on line at www.regulations.gov.

accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of source specific RACT determinations under the 2008 8-hour ozone NAAQS for certain major sources of NOx and VOC emissions in the State of Delaware as described in the amendments to 40 CFR part 52 set forth below. EPA has made, and will continue to make, these materials generally available through http://www.regulations.gov and/or at the EPA Region III Office (please contact the person identified in the "For Further Information Contact" section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference by the Director of the Federal Register in the next update to the SIP compilation.[4]

V. Statutory and Executive Order Reviews

A. General Requirements

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

[4] 62 FR 27968 (May 22, 1997).

- is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866.
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[Insert date 60 days after date of publication in the Federal Register]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action approving the Delaware RACT requirements under the 2008 8-hour ozone NAAQS may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: 11/22/2017

Cosmo Servidio,
Regional Administrator,
Region III.

40 CFR part 52 is amended as follows:

PART 52 – APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 et seq.

Subpart I-- Delaware

2. In § 52.420, the table in paragraph (d) is amended by adding an entry for Delaware City Refinery Company at the end of the table. The added text reads as follows:

§ 52.420 Identification of plan.

* * * * *

(d) * * *

EPA-APPROVED DELAWARE SOURCE-SPECIFIC REQUIREMENTS

Name of source	Permit number	State effective date	EPA approval date	Additional explanation
* * * * * * *				
Delaware City Refinery Company	Secretary's Order No. 2014-A-0014	July 18, 2014	[Insert date of publication in the Federal Register] [Insert Federal Register citation]	(1) Fluid-coking unit (FCU) (2) fluid-catalytic-cracking unit (FCCU) – Approved Nitrogen Oxide Reasonably Available Control Technology Determinations

* * * * *

3. In § 52.420, the table in paragraph (d) is amended by removing the entries for 1) General

Chemical Corporation facility's sulfuric acid and inter-stage absorption system, 2) General Chemical Corporation facility's metallic nitrite process, and 3) SPI Polyols, Incorporated facility's Polyhydrate Alcohol Catalyst Regenerative process.

4. In § 52.420, the table in paragraph (e) is amended by adding an entry for Delaware at the end of the table. The added text reads as follows:

§ 52.420 Identification of plan.

* * * * *

(e) * * *

EPA-approved non-regulatory and quasi-regulatory material.

Name of non-regulatory SIP revision	**Applicable geographic area**	**State submittal date**	**EPA approval date**	**Additional explanation**
* * * * * * *				
Reasonably Available Control Technology under 2008 8-hour ozone National Ambient Air Quality Standard	Statewide	May 4, 2015	[Insert date of publication in the Federal Register] [Insert Federal Register citation]	

Message

From: Schwab, Justin [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=EED0F609C0944CC2BBDB05DF3A10AADB-SCHWAB, JUS]
Sent: 6/22/2017 7:56:53 PM
To: Burke, Marcella [mburke@akingump.com]
Subject: Re: Nice to meet you

Dear Marcella,

Nice to meet you as well. Sounds like you have a lot to think about. It's an exciting time. Look forward to meeting you again.

Best,

Justin

Sent from my iPhone

On Jun 22, 2017, at 3:21 PM, Burke, Marcella <mburke@akingump.com> wrote:

> Dear Justin,
>
> Thanks very much for taking the time to meet me on Tuesday. Ex. 6
> Ex. 6
> Thanks again for taking the time, and I would look forward to our paths crossing again—hopefully by then the EPA will be populated by enough of us that we won't have to whisper about offshore drilling.
> Ex. 6
> Ex. 6 The next time we meet, I'd love to hear the whole story.
>
> Many thanks,
> Marcella
>
> **Marcella C. Burke**
> AKIN GUMP STRAUSS HAUER & FELD LLP
> 1111 Louisiana Street ┆ 44th Floor ┆ Houston, TX 77002-5200 ┆ USA ┆ Ex. 6
> Fax: +1 713.236.0822 ┆ mburke@akingump.com ┆ akingump.com ┆ Bio
>
>

Message

From: Schwab, Justin [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=EED0F609C0944CC2BBDB05DF3A10AADB-SCHWAB, JUS]
Sent: 6/20/2017 6:21:51 PM
To: Burke, Marcella [mburke@akingump.com]
Subject: Re: Tentative: 5 pm Introduction Justin Schwab & Marcella Burke

I should be available yes

Ex. 6

Sent from my iPhone

On Jun 20, 2017, at 2:20 PM, Burke, Marcella <mburke@akingump.com> wrote:

> Justin, I wanted to check in on our tentative meeting today. Ex. 6
> Ex. 6
> Ex. 6 I think it would be worthwhile (at least for me!) to meet you--and they encouraged me to try to get on your dance card. So I wanted to send a quick note as a kind reminder to see if you think you'll be available at 5. Ex. 6
> Ex. 6) If it works out, I'd look forward to it. Thanks!
>
> **Marcella C. Burke**
> **AKIN GUMP STRAUSS HAUER & FELD LLP**
> 1111 Louisiana Street | 44th Floor | Houston, TX 77002-5200 | USA | Direct: +1
> Ex. 6
> Fax: +1 713.236.0822 | mburke@akingump.com | akingump.com | Bio
>
> On Jun 17, 2017, at 12:12 PM, Schwab, Justin <schwab.justin@epa.gov> wrote:
>
> <meeting.ics>
>
>

Message

From: Schwab, Justin [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=EED0F609C0944CC2BBDB05DF3A10AADB-SCHWAB, JUS]
Sent: 6/17/2017 4:06:17 AM
To: Burke, Marcella [mburke@akingump.com]
Subject: Re: Introduction to Marcella Burke

It would be most convenient for me to meet at or near the EPA. There's a Starbucks, Peet's etc. nearby. The metro stop is Federal triangle, we are on 12th street northwest in between constitution and Pennsylvania

Sent from my iPhone

On Jun 16, 2017, at 11:53 PM, Burke, Marcella <mburke@akingump.com> wrote:

> Justin, thank you for your email. Let's plan on 5pm Tuesday. Please let me know when and where works for you and I'll send a calendar invitation to pencil it in, pending your availability. Thanks very much.
>
> **Marcella C. Burke**
> **AKIN GUMP STRAUSS HAUER & FELD LLP**
> 1111 Louisiana Street | 44th Floor | Houston, TX 77002-5200 | USA | Direct: +1 **Ex. 6**
> Fax: +1 713.236.0822 | mburke@akingump.com | akingump.com | Bio
>
> On Jun 16, 2017, at 10:46 PM, Schwab, Justin <schwab.justin@epa.gov> wrote:
>
> > Hello, Marcella,
> >
> > I would be happy to meet with you, if my schedule allows. Right now I should be free from 5-6 on either day.
> >
> > Sent from my iPhone
> >
> > On Jun 16, 2017, at 5:40 PM, Burke, Marcella <mburke@akingump.com> wrote:
> >
> > > Justin,
> > >
> > > I hope all is well in DC. **Ex. 6**
> > > **Ex. 6**
> > > **Ex. 6**
> > >
> > > I know you are very busy and may not be available—and also that we have never met—but I would very much appreciate the opportunity to meet you while I'm there. I understand that EPA has just hired an unprecedented third political Deputy GC; therefore, the office may be full. But I would love to have the chance to say hello and learn more about the agency and possible future opportunities.
> > >
> > > Would you happen to be free on Tuesday or Wednesday? I will be working from the DC office next week and would be happy to

accommodate any time next week that would work for you. I also have a line in with David Fotouhi, maybe we could all get together for coffee.

My resume and application package are attached. To maintain version control, the cover letter covers pretty much all energy-related offices. I would very much look forward to meeting you!

Kind regards,
Marcella

Marcella Burke

Ex. 6

<Marcella Burke Cover Letter and Resume with Deal Sheet.pdf>

The information contained in this e-mail message is intended only for the personal and confidential use of the recipient(s) named above. If you have received this communication in error, please notify us immediately by e-mail, and delete the original message.

Message

From: Schwab, Justin [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=EED0F609C0944CC2BBDB05DF3A10AADB-SCHWAB, JUS]
Sent: 5/9/2017 2:32:21 PM
To: Whitfield, Peter C. [peter.whitfield@hoganlovells.com]
Subject: Re: RFS Meeting

I'll be there if I can

Sent from my iPhone

On May 9, 2017, at 10:31 AM, Whitfield, Peter C. <peter.whitfield@hoganlovells.com> wrote:

> Hi Justin,
> Not sure if you saw Justin Savage's email, but it looks like the meeting will be this Thursday instead of Friday at 2pm. Hope you can make it. If there is anything you want us to address in advance of the meeting that would be helpful, please let me know.
> Thanks,
> Peter

Peter Whitfield
Senior Associate

Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004

Tel: +1 202 637 5600
Direct: Ex. 6
Fax: +1 202 637 5910
Email: peter.whitfield@hoganlovells.com
www.hoganlovells.com

From: Schwab, Justin [mailto:schwab.justin@epa.gov]
Sent: Wednesday, May 03, 2017 10:04 AM
To: Whitfield, Peter C.
Subject: Re: RFS Meeting

That should work,
I'll put a hold on that time

Sent from my iPhone

On May 3, 2017, at 10:02 AM, Whitfield, Peter C. <peter.whitfield@hoganlovells.com> wrote:

> Justin,

Looks like we are trying to reschedule our meeting to Friday, May 12 around 2pm if Mandy is free that day. Any chance you can make that time?

~Peter

Peter Whitfield
Senior Associate

Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004

Tel: +1 202 637 5600
Direct: Ex. 6
Fax: +1 202 637 5910
Email: peter.whitfield@hoganlovells.com
www.hoganlovells.com

Appointment

From: Wehrum, Bill [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=33d96ae800cf43a3911d94a7130b6c41-Wehrum, Wil]
Sent: 9/18/2018 8:36:41 PM
To: Wehrum, Bill [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=33d96ae800cf43a3911d94a7130b6c41-Wehrum, Wil]; Grundler, Christopher [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d3be58c2cc8545d88cf74f3896d4460f-Grundler, Christopher]; Charmley, William [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=fb1828fb00af42ffb68b9e0a71626d95-Charmley, William]; Samulski, Michael [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7ecf1af23a134d2995fd354d03632d6c-Samulski, Michael]; Manning, Bryan [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9507f60b9c47448a88dd5d270bfc2dd4-Manning, Bryan]; Leggett, Cullen [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=8dbc6e558e2342be994d56fd13f48765-Leggett, Cullen]; Mueller, John [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=246e50f4ff824777bc2944cbe96d8307-Mueller, John]; Thrift, Mike [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=0176cfaa431f411bab9801a035378c2b-MTHRIFT]; Orlin, David [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=aa64dad518d64c5f9801eb9bb15b7ec3-DORLIN]; Burch, Julia [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=27b0cd43b0404bab89aef0c8d08c165f-Burch, Julia]; Giannelli, Bob [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7fb7b092ff064a509252056dcaaad9c0-Giannelli, Bob]; Maeroff, Bruce [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=2e697ae33f0848cc856449e9aed61cba-Maeroff, Bruce]; Stevens, JeffreyA [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=75ada6180e0c4d61a9477ea2f4799205-Stevens, Je]; Yen, David [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=865ca449dd0f405a949a635615e68827-Yen, David]
CC: Hengst, Benjamin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c414e2bf04a246bb987d88498eefff06-Hengst, Benjamin]; Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]; Woods, Clint [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=bc65010f5c2e48f4bc2aa050db50d198-Woods, Clin]

Subject: Delegated to Clint Woods: Meeting with Boeing, General Electric & Aerospace Industries Association re: aircraft emission issues (confirmed)
Attachments: RE: Request for Meeting with Assistant Administrator Bill Wehrum - Sept 19 or 20
Location: WJC - N 5400 + Video with AA Ex. 6

Start: 9/20/2018 2:30:00 PM
End: 9/20/2018 3:15:00 PM
Show Time As: Tentative

Bill Wehrum did not attend this meeting
TO: Bill Wehrum, Chris Grundler, Bill Charmley, Mike Samulski, Bryan Manning, Cullen Leggett, John Mueller, Mike Thrift, David Orlin, Julia Burch, Bob Giannelli, Bruce Maeroff, Jeffery Stevens, David Yen

RE: Request for
Meeting with Ass...

Meeting participants (in person):

- Aerospace Industries Association: Leslie Riegle and David Hyde
- Boeing: Ted Austell, Pete Pagano, John Moloney, Dan Allyn, Sean Newsum
- General Electric: Roger Martella, Neal Kemkar, Mike Fitzpatrick, Muni Majjigi, Joe Zelina

Message

From: Pagano (US), Peter A [peter.a.pagano@boeing.com]
Sent: 7/30/2018 11:13:44 AM
To: Rakosnik, Delaney [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=274573739a9f446883072599086ededd-Rakosnik, D]
CC: Lewis, Josh [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b22d1d3bb3f84436a524f76ab6c79d7e-JOLEWIS]; Hengst, Benjamin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c414e2bf04a246bb987d88498eefff06-Hengst, Benjamin]; Atkinson, Emily [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=bb2155adef6a44aea9410741f0c01d27-Atkinson, Emily]
Subject: RE: Request for Meeting with Assistant Administrator Bill Wehrum - Sept 19 or 20

Hi Delaney
Thanks for the message. This is to confirm that the meeting time on Sept 20 will work on our end. We will be in touch to provide participant names closer to the meeting date. Please let me know what additional information you may need.
All the best
Pete Pagano

From: Rakosnik, Delaney <rakosnik.delaney@epa.gov>
Sent: Friday, July 27, 2018 12:31:07 PM
To: Pagano (US), Peter A
Cc: Lewis, Josh; Hengst, Benjamin; Atkinson, Emily
Subject: RE: Request for Meeting with Assistant Administrator Bill Wehrum - Sept 19 or 20

Hi Peter,

Bill Wehrum can accommodate a 45 min meeting on Sept 20th at 10am. How does that time work for your schedules?

Many thanks,

Delaney Rakosnik
Staff Assistant
Immediate Office of the Assistant Administrator
Office of Air and Radiation, USEPA
Room 5406A, 1200 Pennsylvania Avenue NW
Washington, DC 20460
Voice: 202-564-0935
Email: rakosnik.delaney@epa.gov

From: Pagano (US), Peter A [mailto:peter.a.pagano@boeing.com]
Sent: Monday, July 23, 2018 3:17 PM
To: Rakosnik, Delaney <rakosnik.delaney@epa.gov>
Cc: Lewis, Josh <Lewis.Josh@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>
Subject: Request for Meeting with Assistant Administrator Bill Wehrum - Sept 19 or 20

Hi Delaney

The purpose of this message is to request a meeting with Assistant Administrator Wehrum to discuss aircraft emissions issues that are within the jurisdiction of the International Civil Aviation Organization's (ICAO) Environment Committee. OTAQ staff are actively engaged in policy formulation at ICAO as well as in developing domestic implementing regulations. Meeting participants would include representatives from Boeing; General Electric; and the Aerospace Industries Association. Attached below is a draft agenda which includes specific discussion topics. We are requesting Sept 19 or 20 as potential meeting dates because out of town participants for both companies will already be in DC for an industry meeting earlier in the week. We will work with you to find a convenient time that works for Mr Wehrum on either of those days. You should know that I have already provided background regarding this request to OTAQ (Ben Hengst). Thank you in advance for your assistance and please let me know if any additional information would be helpful to you.

Draft Agenda

1. ICAO Background and Regulatory Policy Development Process
2. Industry Engagement with ICAO and its Environment Committee (CAEP)
3. nvPM
4. NOx
5. CO2

Sincerely,

Peter A. Pagano
Director, Environment
The Boeing Company
Ex. 6
Email: peter.a.pagano@boeing.com

Appointment

From: Atkinson, Emily [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=BB2155ADEF6A44AEA9410741F0C01D27-ATKINSON, EMILY]
Sent: 9/21/2018 2:17:00 PM
To: Grundler, Christopher [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d3be58c2cc8545d88cf74f3896d4460f-Grundler, Christopher]; Charmley, William [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=fb1828fb00af42ffb68b9e0a71626d95-Charmley, William]; Samulski, Michael [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7ecf1af23a134d2995fd354d03632d6c-Samulski, Michael]; Manning, Bryan [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9507f60b9c47448a88dd5d270bfc2dd4-Manning, Bryan]; Leggett, Cullen [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=8dbc6e558e2342be994d56fd13f48765-Leggett, Cullen]; Mueller, John [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=246e50f4ff824777bc2944cbe96d8307-Mueller, John]; Thrift, Mike [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=0176cfaa431f411bab9801a035378c2b-MTHRIFT]; Orlin, David [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=aa64dad518d64c5f9801eb9bb15b7ec3-DORLIN]; Burch, Julia [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=27b0cd43b0404bab89aef0c8d08c165f-Burch, Julia]; Giannelli, Bob [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7fb7b092ff064a509252056dcaaad9c0-Giannelli, Bob]; Maeroff, Bruce [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=2e697ae33f0848cc856449e9aed61cba-Maeroff, Bruce]; Stevens, JeffreyA [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=75ada6180e0c4d61a9477ea2f4799205-Stevens, Je]; Yen, David [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=865ca449dd0f405a949a635615e68827-Yen, David]
CC: Hengst, Benjamin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c414e2bf04a246bb987d88498eefff06-Hengst, Benjamin]; Schwab, Justin [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=eed0f609c0944cc2bbdb05df3a10aadb-Schwab, Jus]; Woods, Clint [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=bc65010f5c2e48f4bc2aa050db50d198-Woods, Clin]

Subject: Delegated to Clint Woods: Meeting with Boeing, General Electric & Aerospace Industries Association re: aircraft emission issues (confirmed)
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Bill Wehrum did not attend this meeting
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Meeting participants (in person):

- Aerospace Industries Association: Leslie Riegle and David Hyde
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- General Electric: Roger Martella, Neal Kemkar, Mike Fitzpatrick, Muni Majjigi, Joe Zelina